REPORTS

OF

CASES ADJUDGED

IN THE

Court of King's Bench,

BEGINNING

Michaelmas Term, 25 Geo. 2.

ENDING

Trinity Term, 29 & 30 Geo. 2.

By JOSEPH SAYER, Serjeant at Law.

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PREFACE.

IT is not very eaſy to determine, which is the moſt uſeful method of Reporting a Law Caſe.

Upon the beſt Conſideration, the Reporter was able to give the Matter, the following Method appeared to be the moſt uſeful, and has been obſerved, in reporting the Caſes contained in this Volume.

In the firſt Place, to ſhew in what manner the Caſe came before the Court; in the next, to ſtate the Facts of the Caſe, and if a Queſtion did ariſe upon any part of the Pleadings, to ſtate ſuch Part; then, to mention the Queſtion or Queſtions

PREFACE.

Queſtions which aroſe in the Caſe; and to conclude with the Judgment of the Court.

As the material Things, which were ſaid, and the Caſes, which were relied upon, in arguing a Caſe, are taken Notice of by the Court, in giving Judgment, the Arguments of Council, for the ſake of avoiding Repetition, are omitted.

Upon the whole, the Endeavour has been, to Report the Caſes in the Manner, which ſeemed moſt proper to convey the neceſſary Information, and to do this, with as much Brevity as was conſiſtent with Perſpicuity.

Michaelmas

Michaelmas Term,

25 Geo. 2. 1751.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Golding *verſ.* Crowle.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had, in an action upon the caſe, it appeared; that the action was for maliciouſly proſecuting an indictment for perjury; that it was proved on the part of the plaintiff, that upon the trial of the indictment he had been acquitted upon the merits; that it was proved on the part of the defendant, that there was probable cauſe for preferring the indictment; that *Deniſon* J. before whom the action was tried, had directed the jury, that upon this evidence they ought to find a verdict for the defendant; and that the verdict was for the plaintiff.

If a bill of indictment have been found a true bill, expreſs malice muſt be proved in an action for maliciouſly proſecuting the indictment.

The rule was made abſolute.

And by the court—As the direction of the judge was in a matter of law, and was, in our opinion, very right, the preſent verdict, which is contrary thereto, ought not to ſtand. More was proved in this caſe on the part of the defendant, than it was incumbent upon him to prove; for in the caſe of *Savil* v. *Roberts*, *Salk.* 15. it is laid down, that if a bill of indictment have been found a true bill, the defendant, in an action for maliciouſly proſecuting the indictment, ſhall not be obliged to prove a probable cauſe for preferring the bill: But it ſhall lie upon the plaintiff to prove expreſs malice.

Rex *verſ.* The inhabitants of Weſt-Shefford.

A ſettlement cannot be gained, by reſiding leſs than forty days upon an eſtate for years, which a man becomes intitled to by act of law.

IN an order of ſeſſions it was ſtated; that *John Bird*, late huſband to the *pauper*, went to reſide under a certificate in the pariſh of *Weſt-Shefford*; that during his reſidence there under the certificate, *John Bird* his father died, to whom and his aſſigns an eſtate, of the value of fourteen pounds a year, had been granted for ninety-nine years, determinable upon the death of *John Bird* the father, and *John Bird*, late huſband to the *Pauper*; and that after the death of *John Bird* the father, *John Bird*, the *Pauper's* huſband, entered upon the eſtate, and reſided upon it to the time of his death, which happened twenty-eight days after his entering thereupon.

The queſtion was, Whether *John Bird*, late huſband to the *Pauper*, gained a ſettlement in the pariſh of *Weſt-Shefford?*

It was holden that he did not.

And

And by *Lee* Ch. J.—It has been conſidered as a ſettled point, ever ſince the caſe of *Rex* v. *the inhabitants of Grandborough*, *Trin.* 4 *G.* 1. that if a perſon become intitled by act of law to an eſtate for years, and go to reſide thereupon, he cannot be removed from it.

It is likewiſe a ſettled point, that if a perſon reſide forty days upon an eſtate from which he is irremovable, he gains a ſettlement: But as it has never been holden, that a ſettlement can be gained by reſiding leſs than forty days upon ſuch an eſtate, and as in the preſent caſe there was a reſidence of only twenty-eight days, the *pauper* did not gain a ſettlement.

Wood *verſ.* Lake.

A parol agreement for the liberty to ſtack coals upon the land is good for ſeven years.

IN a caſe reſerved, in an action upon the caſe, it was ſtated; that the defendant had agreed, by a parol agreement, that the plaintiff ſhould have the liberty of ſtacking coals upon part of a cloſe belonging to the defendant, for the term of ſeven years, and that, during this term, he ſhould have the ſole uſe of that part of the cloſe, upon which he was to have the liberty of ſtacking coals; and that, after the plaintiff had, purſuant to this agreement, enjoyed the liberty of ſtacking coals three years, the defendant locked up the gate of the cloſe.

The queſtion was, Whether this agreement was good for ſeven years?

Lee Ch. J. and *Deniſon* J. were of opinion, that it was.

And by them—In the caſe of *Webb* v. *Paternoſter*, *Palm.* 71. it is laid down, that the grant of a licence to ſtack hay upon land does

not amount to a leaſe of the land; and, although it be in that caſe ſaid, that ſuch a licence, provided the grant be for a time certain, is irrevocable, it by no means follows, that an intereſt in the land does thereby paſs. As the agreement in the preſent caſe was only for an eaſement, and not for an intereſt in the land, it did not amount to a leaſe, and conſequently it was, notwithſtanding the ſtatute of frauds and perjuries, good for ſeven years.

Wright J. was abſent.

Foſter J. concurred in opinion, that the agreement did not amount to a leaſe: But he inclined to be of opinion, that the words in the ſtatute of frauds and perjuries, *any uncertain intereſt in land*, do extend to this agreement, and conſequently that it was not good for more than three years.

Lee Ch. J. and *Deniſon* J. inclined to be of opinion, that the words in that Statute, *any uncertain intereſt in land*, do relate only to intereſts, which are uncertain as to the time of their duration.

After taking time to conſider, it was holden that the agreement was good for ſeven years.

Tyler *verſ.* Browning.

Charcoal is not Firewood within the meaning of a Statute, exempting firewood from the payment of toll at at urnpike.

IN a caſe reſerved, in an action upon the caſe, it was ſtated; that horſes laden with firewood are, by the Statute under which a certain turnpike was erected, exempted from the payment of toll; and that the defendant, who was collector of toll at the turnpike, had inſiſted upon, and taken toll for a horſe laden with charcoal.

The

The queſtion ſubmitted to the court was, Whether charcoal be firewood within the meaning of the ſtatute?

It was holden that it is not.

In arguing this caſe, the council for the plaintiff attempted to argue, that, although the court ſhould be of opinion, that charcoal is not firewood, the plaintiff ought not to recover: For that charcoal is certainly coal, and that, by this act, horſes laden with coal are only liable to half as much toll as other horſes; whereas the defendant has inſiſted upon, and taken the whole toll for the plaintiff's horſes. But the court refuſed to permit this to be argued? And *Lee* Ch. J. ſaid, As the queſtion, Whether charcoal be coal? is not ſubmitted to the court by the caſe, we cannot take it into our conſideration.

Todd *verſ.* Dodd.

If one of two perſons, who have entered into a warrant of attorney to confeſs a judgment, die, judgment may be entered againſt the ſurvivor.

UPON a rule to ſhew cauſe, why leave ſhould not be given to enter judgment upon an old warrant of attorney to confeſs a judgment, it appeared; that the warrant of attorney was entered into by two perſons; and that one of them was dead.

The Queſtion was, Whether Judgment ought to be entered againſt the ſurvivor.

After taking time to conſider, it was holden that it ought, and the rule was made abſolute.

And by *Lee* C J.—In the caſe of *Still* v. *Still*, 1 *Barn.* 35 *Mich.* 11 *G2.* the court of common pleas

pleas gave leave to enter judgment in a caſe like the preſent: But as that court did in the caſe of *Laycock* v. *Garforth*, 2 *Barn.* 38. *Eaſt.* 21 *G.* 2. which was alſo like the preſent caſe, refuſe to give ſuch leave, the caſe of *Still* v. *Still* is not now to be conſidered as an authority.

We do however think it reaſonable, that leave ſhould be given in the preſent caſe, to enter judgment againſt the ſurvivor. It appears from divers caſes, which have been cited, that if the power given to an attorney can be executed virtually, it may be executed, although it cannot be executed ſtrictly; and in 1 *Show.* 91. it is ſaid to have been ruled upon motion; that if a woman, after having entered into a warrant of attorney to confeſs a judgment, marry, judgment may be entered againſt both her and her huſband.

Rex *verſ.* Lediard.

A *Certiorari* does not lie, for removing a warrant of a juſtice of the peace.

IN obedience to a *certiorari*, for returning a conviction concerning the forfeiture of a horſe, the defendant returned; that information being made to him upon oath by *J. S.* and *J. N.* that they had ſeized a horſe, becauſe he was drawing in a carriage, wherein there were more than five horſes, and had delivered him, purſuant to the direction of the ſtatute, to a conſtable; and that upon this information, he had iſſued a warrant, by which the conſtable was commanded to re-deliver the horſe to *J. S.* and *J. N.*

Upon this return, it was holden that the *Certiorari* ſhould be quaſhed.

And by *Lee* Ch. J.—There is in this caſe no conviction. It is eſſential to a conviction, that it be founded upon a proceeding againſt a perſon;

a perſon; but in the preſent caſe, the proceeding was againſt a thing. It is likewiſe eſſential to a conviction, that it be a judicial act; but the iſſuing of the warrant in the preſent caſe was a miniſterial act, which the defendant was required by the ſtatute giving the forfeiture to do. A *Certiorari* does not lie for removing a warrant of a juſtice of the peace; the remedy for the party thereby injured being by an action.

Kirk *verſ.* Broad.

A Rule having been obtained, for changing the venue in an action upon the caſe, wherein the plaintiff had declared upon a promiſſory note, the queſtion, upon a rule to ſhew cauſe why that rule ſhould not be ſet aſide, was, Whether the venue could in ſuch action be changed?

The venue may be changed in the king's bench in an action upon a promiſſory note.

It was holden that it might.

And by *Lee* Ch. J.—It is the ſettled practice (A) of this court, that the venue may be changed in any action, the right of which is founded upon ſimple contract. If an action be brought in this court upon a policy of inſurance, the venue may be changed, unleſs the policy be a deed.

Weaver *verſ.* Chandler.

UPON a rule to ſhew cauſe, why an *Exoneretur* ſhould not be entered upon the bail piece, it appeared that the bail had rendered

Leave given to enter an *Exoneretur* on the bail piece.

(A) The practice of the court of common pleas is different as to this matter from that of the court of king's bench. If the right of an action in that court be either in the whole or in part founded upon a promiſſory note, the venue, as appears from 1 *Barn.* 341, 345, 349. 2 *Barn.* 390. 392. cannot be changed.

dered the defendant regularly, and had given notice of the render to the plaintiff's attorney; that the defendant had been ſince in cuſtody; and that the defendant's attorney had omitted to enter an *Exoneretur* upon the bail piece.

The rule was made abſolute, upon paying the coſts which had accrued ſince the render.

Rex *verſ.* The Inhabitants of Ilam.

A ſettlement cannot be gained by a ſervice which commences before the Hiring.

IN an order of ſeſſions it was ſtated; that the *Pauper* had ſerved *J. S.* in the pariſh of *Ilam* eight weeks upon liking; that at the end of the eight weeks *J. S.* hired him for a year, to commence from the beginning of the eight weeks; and that, including the eight weeks, he ſerved a year and ten days.

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Ilam?*

It was holden that he did not.

And by the court—There muſt, in order to gain a ſettlement, be a hiring for a year, either abſolute or conditional, previous to the commencement of the ſervice, which there was not in the preſent caſe. The caſes have already gone far enough, if not too far, as to the gaining of a ſettlement by hiring and ſervice: But no one has gone ſo far as to hold, that the hiring may have a retroſpect to a ſervice anterior thereto.

Cary

Carey *verſ.* Humot.

A judgment ſigned for non-payment for the iſſue ſet aſide, becauſe ſigned in leſs than twenty-four hours.

UPON a rule to ſhew cauſe, why the judgment ſhould not be ſet aſide for irregularity, it appeared; that the judgment was ſigned for non-payment for the iſſue; and that it was ſigned within twenty-four hours after the delivery of the iſſue.

The rule was made abſolute.

And by the court—a reaſonable time after the delivery of the iſſue ought to be allowed for payment; and we are of opinion, that leſs than twenty-four hours is not a reaſonable time.

Rex *verſ.* The Inhabitants of Marden.

A ſettlement cannot be gained by hiring the moiety of a tenement of the annual value of ſixteen pounds.

IT was ſtated in an order of ſeſſions; that the *Pauper* and *J. S.* jointly hired a tenement in the pariſh of *Marden*, at the rent of ſixteen pounds a year; that they occupied it jointly; that each of them paid a moiety of the rent; and that the tenement had thentofore been let for twenty pounds a year.

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Marden?*

It was holden that he did not.

And by the court—As the tenement is not ſtated, to be at preſent of the value of twenty pounds a year, we cannot take it to be ſo.

It has been ſaid, that as each of the tenants was liable to the whole rent, the *Pauper* ought to gain a ſettlement: But it is certain, that neither of them had an intereſt in more than a moiety of the tenement, which is only eight pounds a year.

It has likewiſe been ſaid, that, as no power of removal is given by the 13 & 14 *Ch.* 2. *c.* 12. as to any perſon or *perſons* coming to ſettle in a tenement of the value of ten pounds a year, the *Pauper*, being one of two perſons who jointly hired a tenement of the yearly value of ſixteen pounds, did thereby become irremoveable, and conſequently he gained a ſettlement: But although the word *perſons* be in the Statute, it never could be the intention of the Legiſlature, that two perſons ſhould gain a ſettlement, by hiring a tenement of the yearly value of ten pounds.

Hilary

Hilary Term

25 Geo. 2. 1752.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Slr Michael Foſter, } *Juſtices.*

Rex *verſ.* The Inhabitants of Buckingham.

A ſon, who comes with his father to reſide in a pariſh under a certificate given to the father, cannot gain a ſettlement by a hiring in that pariſh during ſuch reſidence and a ſervice under the hiring.

IN an order of ſeſſions it was ſtated; that the *Pauper*, together with his family, of which the *Pauper* was a part, came to reſide in the pariſh of *Buckingham*, under a certificate given to the father; that, during the reſidence of the *Pauper* with his father under the certificate, he was hired for a year as a ſervant in the pariſh of *Buckingham*; and that he ſerved the year in that pariſh.

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Buckingham?*

It was holden that he did not.

And by the court—The *Pauper* came to reſide in the pariſh of *Buckingham* under a certificate; and it is by the 9 & 10 *W.* 3. *c.* 11. enacted, " That no perſon whatſoever, who " ſhall come into any pariſh by a certificate, " ſhall be adjudged, by any act whatſoever, " to have procured a legal ſettlement in ſuch " pariſh, unleſs he ſhall really and *bona fide* " take a leaſe of a tenement of the value of " ten pounds, or ſhall execute ſome annual " office in ſuch pariſh, being legally placed " in ſuch office."

Wright *verſ.* Macevoy.

A writ of *Fieri Facias* may be amended by adding a *Teſte* thereto.

UPON a rule to ſhew cauſe, why a writ of *Fieri Facias* ſhould not be ſet aſide, the queſtion was, If the writ could be amended by adding a *Teſte* thereto?

It was holden that it might.

And by *Lee* Ch. J.—According to what is laid down in divers old caſes, which have been cited, a writ is not amendable by adding a *Teſte* thereto: But courts have of late years gone much further in ordering amendments than they did heretofore.

It has been ſaid, that there is in the preſent caſe nothing to amend by: But an award of a writ of *Fieri Facias*, with a *Teſte*, may be entered upon the roll, and when this done, the writ may be amended by the Roll.

Lewis

Lewis *verſ.* Wallis.

Nil habuit in Tenementis cannot be pleaded in an action for the uſe and occupation by the permiſſion of the plaintiff.

IN an action upon the caſe, for the uſe and occupation of land, by the permiſſion of the plaintiff, the defendant pleaded *nil habuit in tenementis.*

Upon a demurrer to this plea, it was holden to be bad.

And by *Lee* Ch. J.—Actions for the uſe and occupation, which were heretofore much diſcouraged, have of late years been encouraged, and a recovery in them is, in certain caſes, made more eaſy by a modern ſtatute.

In the caſe of *Richards* v. *Holditch*, *Hil.* 13 *G.* 2. it was holden, upon great conſideration, that *nil habuit in tenementis* is not a good plea, in an action for the uſe and occupation of a houſe by the permiſſion of the plaintiff: And it would be very unreaſonable, that the defendant in ſuch action ſhould be allowed to deny the title of the plaintiff, by whoſe permiſſion he entered upon, and occupied the premiſes.

In order to diſtinguiſh the preſent caſe from the caſe of *Richards* v. *Holditch*, it has been ſaid; that it is not in this caſe expreſsly alledged, that the land was the land of the plaintiff; whereas in the caſe of *Richards* v. *Holditch*, it was expreſsly alledged, that the houſe was the houſe of the plaintiff: And upon the ground of this diſtinction it has been argued; that for want of its being expreſsly alledged, that the land was the land of the plaintiff, there is not a good conſideration ſet out by the plaintiff, and conſequently that the

the promiſe of the defendant to pay for the uſe and occupation is *nudum Pactum.* But we are of opinion, that the allegations, which are, that the defendant uſed and occupied the land at his own requeſt, and by the permiſſion of the plaintiff; and that he promiſed to pay for the uſe and occupation, do ſo ſtrongly imply, that the land was the land of the plaintiff, that if the court ſhould intend it was not, it would be a very foreign intendment.

Rex *verſ.* Spencer.

The clerk in court is bound to perfect and bring in the *Poſtea* after an acquittal upon an indictment.

UPON a rule for the defendant's clerk to ſhew cauſe, why he ſhould not perfect the *Poſtea*, by entering an acquittal, and bring it into court, it appeared; that upon removing the indictment from a court of quarter ſeſſions, a recognizance had been entered into by the defendant's bail, the terms of which were, that the defendant ſhould cauſe the indictment to be tried at a time and place therein mentioned, at his own expence; that the indictment was tried at the time and place mentioned in the recognizance; that the defendant was acquitted; and that he had not paid the bill due to his clerk in court for fees.

The queſtion was, Whether the clerk in court ought to perfect the *Poſtea*, by entering an acquittal, and bring it into court, before his bill for fees was paid?

It was holden that he ought.

The *Poſtea* being afterwards perfected and brought into court, a motion was made, that the recognizance might be diſcharged.

In

In oppoſition to this motion it was ſaid; that it has been the conſtant practice of the crown-office, not to diſcharge a recognizance in a caſe like the preſent, before the verdict and judgment were entered upon record; and that if this practice is not adhered to, the ſtamp duty will be leſſened; the officers of the court will be injured; and the records of the court will frequently be incompleat.

The recognizance was ordered to be diſcharged.

And by *Wright* J. (*Lee* Ch. J. being abſent) —As the terms of the recognizance have been complied with, it is highly reaſonable that it ſhould be diſcharged.

Wingfield *verſ.* Stratford and Oſman.

IN an action of *Trover*, the plaintiff declared for the converſion of a gun and dog.

The keeping of a gun is not a keeping of an engine for killing or deſtroying the game.

The defendants pleaded, that the plaintiff, not being a perſon qualified ſo to do, kept the gun and dog, the gun being an engine for the killing of the game, and the dog being a ſetting-dog; and that they, as ſervants, and by the command of Sir *Francis Daſhwood*, Lord of the Manor wherein the dog and gun were kept, took the ſame from the plaintiff, as it was lawful for them to do.

Upon a demurrer to this plea, it was holden to be bad; becauſe it amounted to the general iſſue.

And by *Deniſon* J.—It is a ſettled rule in pleading, that no matter which amounts to the general iſſue can be pleaded ſpecially; and the

the reaſon is, that every ſuch matter may be given in evidence upon the general iſſue. A releaſe may be pleaded in an action of *Trover*; becauſe the converſion is thereby admitted: But I do not apprehend, that any matter, except a releaſe, can be pleaded ſpecially in ſuch action; becauſe no other matter can, as I conceive, be pleaded, which would not amount to a denial of the converſion, and conſequently it would amount to the general iſſue.

It was likewiſe holden, that, if this plea had not been bad, by reaſon of its amounting to the general iſſue, it would have been bad; becauſe it is not alledged, that the gun had been uſed for killing the game.

And by *Lee* Ch. J.—It is not to be imagined, that it was the intention of the legiſlature, in making the 5 *ann. c.* 14. to diſarm all the people of *England*. As greyhounds, ſetting dogs, hayes, lurchers and tunnels are expreſsly mentioned in that ſtatute, it is never neceſſary to alledge, that any of theſe have been uſed for killing or deſtroying the game; and the rather, as they can ſcarcely be kept for any other purpoſe than to kill or deſtroy the game: But as guns are not expreſsly mentioned in that ſtatute, and as a gun may be kept for the defence of a man's houſe, and for divers other lawful purpoſes, it was neceſſary to alledge, in order to its being comprehended within the meaning of the words *any other engines to kill the game*, that the gun had been uſed for killing the game.

In the caſe of (B) *Rex* v. *Gardiner*, *Trin.* 11 & 12 *G.* 2. it was holden, upon great conſideration,

(B) A report of this caſe has been ſince publiſhed in *Strange* 1098, and it may be inferred from the report of the caſe by Sir *John Strange*, that this point had never been before

ſideration, that there is a difference betwixt a gun and the other things expreſsly mentioned in the 5 *Ann. c.* 14. which can only be kept for bad purpoſes, and a conviction for keeping a gun contrary to that ſtatute, was quaſhed; becauſe it did not appear, that the gun had been uſed for killing the game.

Murray *verſ.* Wilſon.

IN the declaration, in an action for the coſts of an action in an inferior court, wherein there was judgment of *Nonproſs*, it was alledged, that the inferior court had been holden from time beyond memory; and that at a court holden before a certain perſon, and at a certain place, judgment of *Nonproſs* was given in an action upon a promiſſory note.

The defendant in an action in an inferior court may avail himſelf of the judgment of that court, without ſhewing that the court was rightly holden, or had juriſdiction.

Upon a demurrer to this declaration, it was objected; that the right of holding the court before the perſon, and at the place mentioned in the declaration, is not ſhewn; and that it does not appear, that the cauſe of action aroſe within the juriſdiction of the court.

The declaration was holden to be good.

And by *Lee* Ch. J.—It is laid down, in divers caſes which have been cited; that if the plaintiff in an action in an inferior court plead a judgment in that action, he muſt ſhew the right of holding the court, and that the cauſe of action aroſe within its juriſdiction: But it is in no caſe laid down; that it is incumbent upon the defendant in an action in an inferior court, who pleads a judgment in that action,

fore determined; it being therein ſaid, that there was a queſtion upon the point in the caſe of *King* v. *King*, *Paſch.* 3 *G.* 1. but that it was not determined.

to ſhew either of theſe things. It is very unreaſonable, that the plaintiff in an action in an inferior court ſhould avail himſelf of a judgment in that action, unleſs the court was rightly holden, and had juriſdiction: But it is highly reaſonable, that the defendant in an action in an inferior court ſhould avail himſelf of a judgment in that action, although the court was not rightly holden, or had not juriſdiction; for, as it was the fault of the plaintiff to bring his action in an improper court, the defendant ought not to be thereby prejudiced.

Clemens *verſ.* Reynolds, Adminiſtrator.

In what manner *tout temps priſt* muſt be pleaded by an adminiſtrator.

IN an action upon the caſe, the plaintiff declared upon a promiſe of the defendant's inteſtate.

The defendant pleaded a tender; and that he has been at all times ſince the death of his inteſtate ready to pay.

Upon a demurrer to this plea, it was ſhewn for cauſe; that it is not alledged, that the defendant's inteſtate was at all times, from the time of making the promiſe to the time of his death, ready to pay.

The plea was holden to be bad.

And by the court—Whenever *tout temps priſt* is pleaded by an adminiſtrator, he muſt alledge; that his inteſtate was at all times, from the time of making promiſe to the time of his death, ready to pay; and that he has at all times, ſince the death of his inteſtate, been ready to pay.

Cunningham

Cunningham *verſ.* Johnſon.

THE defendant pleaded his privilege in abatement, which was, that he is clerk of the errors in the court of Common Pleas, and as ſuch daily attendant upon that court.

The particular facts alleged in a plea of privilege muſt be verified by affidavit.

A rule for ſetting this plea aſide was made abſolute; becauſe the truth thereof was not verified by affidavit.

And by the court—It was neceſſary for the defendant to ſwear; that the facts alledged, namely, that he is clerk of the errors in the court of Common Pleas, and that he is daily attendant upon that court, are true.

In the caſe of *Onſlow* v. *Booth*, *Trin.* 12 *G.* 1. in this court, a plea of privilege was ſet aſide, although it was ſworn generally that the plea was true; becauſe it was not ſworn, that the particular facts therein alledged were true.

Rex *verſ.* Goodman.

UPON a rule to ſhew cauſe, why a ſmall fine ſhould not be ſet upon the defendant, who had been convicted upon an indictment for a nuſance, it appeared; that the indictment, which was found at a court of conſervancy, for an encroachment of about five yards in length upon the river *Thames*, had been removed by the defendant into this court; and that the nuſance was now abated.

The court refuſed to ſet a ſmall fine upon a defendant convicted of a public nuſance, unleſs he would conſent to go before the maſter.

The rule was diſcharged.

And by the court—As the defendant will not conſent to go before the maſter, it is not proper to ſet a ſmall fine. It has been ſaid; that as no recognizance for the payment of coſts was entered into upon the removal of this indictment, ſuch a recognizance being only required upon the removal of an indictment from a court of quarter ſeſſions, the proſecutor is not entitled to coſts: But this circumſtance, that the proſecutor is not entitled to coſts, becauſe no recognizance has been entered into for the payment of coſts; renders it quite improper, for the court to diſcharge the defendant on the payment of a ſmall fine. It is on the contrary highly proper; that the court ſhould, as was done in the caſe of *Rex* v. *Dyke*, *Trin.* 21 *G.* 2. ſet ſuch a fine, that the third part thereof may be ſufficient, to reimburſe the proſecutor a conſiderable part of his coſts: For, unleſs a proſecutor is, in a caſe like the preſent, to have a conſiderable part of his coſts, it will be a great diſcouragement to proſecutions for public nuſances.

In the caſe of *Rex* v. *Haddock*, *Hil.* 12 *G.* 2. which was a conviction upon an indictment for a publick nuſance, the court, notwithſtanding the nuſance was abated, refuſed to ſet a ſmall fine, unleſs the defendant would conſent to go before the maſter; and upon this refuſal, the defendant did conſent to go before the maſter.

Rex

Rex *verſ.* The Inhabitants of Locherly.

A ſettlement cannot be gained by hiring the wick of a dairy, together with the feed of land.

IN an order of ſeſſions it was ſtated; that the *Pauper* hired of *J. S.* a cottage, in the pariſh of *Locherly*, of the yearly value of twenty-five ſhillings; the wick of a dairy of ſixteen cows, which were to be fed upon certain land of *J. S.* at the rate of three pounds five ſhillings each cow; and the liberty of feeding a horſe and ſome pigs on the land whereon the cows were to be fed; and that the *Pauper* was moreover to have all the ſhort ſtraw which aroſe in thraſhing wheat, and five loads of hay, if ſo much ſhould be wanted to feed the cattle with.

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Locherly?*

It was holden that he did not.

And by *Wright* J. (Lee Ch. J. being abſent) —Although the word tenement be a word of very extenſive ſignification, it cannot extend to a perſonalty, becauſe no perſonalty can, with any degree of propriety, be ſaid to lie in tenure. The contract in the preſent caſe, as to every thing except the cottage, was for a mere perſonalty; for although the cows of which the *Pauper* was to have the wick, and the other cattle were to be fed upon land; yet no intereſt in the land, and only the mere right of feeding the cattle thereupon, did paſs by the contract. It was, moreover, part of the contract; that the cattle were to be fed upon the land of *J. S.*

If a man were to hire a farm ready ſtocked, at the rate of twenty pounds a year; and the annual

annual value of the farm, excluſive of the ſtock, were under ten pounds, he would not gain a ſettlement by the hiring.

It has been truly ſaid, that it was not expreſsly determined, in the caſe of *Rex* v. *The Inhabitants of Minchinghampton*, 30 *G.* 2. that hiring the paſture of land would not gain a ſettlement; the determination in that caſe being founded upon a want of adjudication: But the opinion of the court did, in that caſe, appear plainly to be; that the paſture of land is not a tenement, by the hiring of which a ſettlement may be gained.

Watſon qui tam *verſ.* Jackſon, Boys and Webſter.

Judgment as in the caſe of a *Nonſuit*, ought not to be given, unleſs all the defendants apply for it.

UPON a rule to ſhew cauſe, why judgment as in the caſe of a *Nonſuit* ſhould not be given, it appeared; that the action was for a penalty given by one of the ſtatutes for the preſervation of the game; that the defendants had all joined in the plea of not guilty; and that *Webſter* had not joined in applying for the rule.

One queſtion was, Whether the 14 *G.* 2. *c.* 17. whereby the court is empowered to give judgment as in the caſe of a *Nonſuit*: "In "any action between party and party," extends to this action?

It was holden that it does.

And by the court—As no part of the penalty, for which this action was brought, is given to the *King*, it is, notwithſtanding a moiety of the penalty be given to the poor of the pariſh, wherein the offence was committed, an action between party and party.

Another

Another queſtion was, Whether, as *Webſter* had not joined in applying for the rule, judgment as in the caſe of a *Nonſuit* ought to be given?

It was holden that it ought not.

And by the court—As all the defendants have joined in the plea of not guilty, and one of them has not joined in the application for judgment as in the caſe of a *Nonſuit*, the court ought not to give ſuch judgment.

Eaſter Term,

25 Geo. 2. 1752.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Herbert *verſ.* Williams.

The coſts of a feigned iſſue, ordered in a criminal proceeding, ought always to follow the verdict.

UPON a rule to ſhew cauſe, why an information ſhould not be filed againſt the defendant, for a miſdemeanor, a feigned iſſue was, by conſent, ordered.

The iſſue having been found for the defendant, and the rule to ſhew cauſe having in conſequence of the verdict been diſcharged, the queſtion, upon an application by the defendant for coſts, was, Whether, as coſts are not mentioned in the rule for the feigned iſſue, or in the rule for diſcharging the rule to ſhew cauſe, he ought to have any?

It

It was holden, that he ought to have the coſts of the iſſue, but not any of the rule to ſhew cauſe.

And by *Wright* J. (*Lee* Ch. J. being abſent) —It has been ſaid; that although coſts always follow the verdict, when a feigned iſſue is ordered in a civil action, none ought to be paid, when a feigned iſſue is ordered in a criminal proceeding; becauſe neither party is entitled to coſts in a criminal proceeding: But in the caſe of *Still* v. *Rogers*, wherein a feigned iſſue was ordered in a criminal proceeding, it was holden, that coſts ought to follow the verdict. This caſe is mentioned in 1 *Lilly's Abr.* 447. as of the firſt year of Queen *Anne;* but, upon ſearching in the crown office, it is found to have been in the third year of that Queen. From a note I have of this caſe, it appears; that, although coſts were not mentioned in the rule for the feigned iſſue, the determination of the Court of King's Bench was, that coſts ought to follow the verdict; and it was ſaid by *Holt* Ch. J. that where a feigned iſſue is ſent by a court of equity to be tried in a court of law, coſts do not follow the verdict; becauſe the matter goes back for the conſideration of the court of equity: But that where a feigned iſſue is ordered by a court of law, coſts ought always to follow the verdict.

Rex *verſ.* The Juſtices of the Peace of the Corporation of Rye.

An information is not to be granted againſt a juſtice of the peace, unleſs he has acted from a corrupt or partial motive.

UPON a motion for a rule to ſhew cauſe, why an information ſhould not be filed againſt the defendants for a miſdemeanor, in diſcharging an appeal to a Poor's rate, an affidavit was read, wherein it was ſworn; that the *perſon appealing* was over-rated; *that the juſtices were themſelves* under-rated;

and that although very ſtrong evidence of both theſe facts was given at the quarter ſeſſions, the juſtices diſcharged the appeal, and refuſed to make a ſpecial order. It was, moreover ſaid, that if the court ſhould not make a rule to ſhew cauſe, upon which the truth of the facts alledged in the affidavit may be put into a method of trial, there would be a failure of juſtice, the determination upon the appeal being final.

The court refuſed to make a rule to ſhew cauſe.

And by *Lee* Ch. J.—It is the ſettled practice of this court, never to grant an information for any thing done by a juſtice of the peace in the execution of his office, unleſs the court be ſatisfied, that he acted from a corrupt or partial motive. If there ſhould be a failure of juſtice in the preſent caſe, it will be owing to the act of parliament; by which an appeal to a Poor's rate in a corporation is given to the quarter ſeſſions of the corporation. This, as the juſtices of the corporation are frequently intereſted in the matter in queſtion; and their determination is final, may be a reaſon for altering law? But it is by no means proper, to make a rule to ſhew cauſe in the preſent caſe; in as much as the making of ſuch a rule would amount to a prejudication of this court, that the juſtices have acted from a corrupt or partial motive. There is, perhaps, reaſon to ſuſpect the defendants of having acted from a partial motive: But it is by no means certain, that they have done ſo, even if the facts alledged in the affidavit are true; for the matter in queſtion might appear in different lights to the judgments of different perſons. Upon the whole, this this does not appear a caſe proper for an information againſt juſtices of the peace; and if it be not, it would be very improper to make a rule to ſhew cauſe, merely for the

ſake

ſake of bringing juſtices of the peace before the court, that the truth of facts alledged in the affidavit may be put into a method of trial.

Rex *verſ.* Jopſon and five others.

UPON a rule to ſhew cauſe, why the indictment ſhould not be quaſhed, it appeared; that the charge in the indictment was, that the defendant, together with many other perſons to the jurors unknown, did unlawfully aſſemble themſelves to diſturb the peace; and that being ſo aſſembled, the defendants with force and arms the mine of black lead of *J. S.* did unlawfully break and enter; and ſixty pounds weight of the black lead of *J. S.* did unlawfully carry away.

An indictment, wherein a diſturbance of the peace is charged, ought not to be quaſhed.

The rule was diſcharged.

And by *Lee* Ch. J.—It is always in the diſcretion of the court, whether an indictment ſhall be quaſhed, or the defendant be left to demur, or to move in arreſt of judgment. The indictment in the preſent caſe, which contains a charge of a diſturbance of the peace, in conſequence of an unlawful aſſembly to diſturb the peace, appears to be good; but, however, that it may be, it is by no means proper for the court to quaſh ſuch an indictment.

Huiſh *verſ.* Sheldon.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an action of *Trover*, it appeared from the report of the judge; that the verdict was for the plaintiff; that *Deard*, one of the plaintiff's witneſſes, in giving his evidence had ſaid, that a ſilver

A new trial is not to be granted, on account of a miſtake by a witneſs in giving his evidence.

milk pot, for the converſion of which the action was brought, had been ſold by him to the plaintiff.

An affidavit was read, in which it was ſworn; that it appeared from a memorandum in *Deard's* book; that the milk-pot was left with him by the plaintiff, to be paid for by *J. S.* and that the miſtake of *Deard*, in giving his evidence, was owing to the omiſſion of a ſervant, who, in copying from *Deard's* book the plaintiff's account, from which account *Deard* had given his evidence, had omitted to copy the memorandum,

The rule was diſcharged.

And by the court—It has been ſaid; that if the fact mentioned in the memorandum had been proved at the trial, the verdict would probably have been for the defendant: But it would be productive of the moſt dangerous conſequences, if a verdict ſhould be ſet aſide; becauſe a witneſs has either from inattention, or from the want of being prepared, made a miſtake in giving his evidence.

Crozier *verſ.* Storke.

Leave given to plead immaterial pleas.

UPON a motion, for leave to plead three pleas, it appeared; that two of the pleas were immaterial; and it was ſaid; that the giving leave to plead theſe two pleas would anſwer no other end, than putting the plaintiff to the expence of taking them out, and demurring to them.

A rule was made for leave to plead the three pleas.

And

And by *Lee* Ch. J.—It is not uſual for the court, upon a motion for leave to plead ſeveral pleas, to go into the conſideration of the materiality of the pleas, and the doing thereof would open a door for almoſt endleſs altercation. Courts were formerly a little ſtrict, as to the giving leave to plead ſeveral pleas: But it has of late (c) years been the practice, to give leave to plead any number of pleas, provided no two of them be inconſiſtent with each other.

Hallet *verſ.* Hodges.

IN a caſe reſerved, in an action of debt upon a bond, it was ſtated; that the penalty of the bond was three hundred pounds; that it was given for ſecuring the payment of one hundred and fifty pounds by inſtalments; namely, of fifty pounds upon the 30th day of *November* 1750, another fifty pounds upon the 30th of *March* 1751, and the other fifty pounds upon the 30th day of *November* 1751; that the condition of the bond was, that upon the payment of the ſaid ſums on the ſaid days reſpectively the bond was to be void, otherwiſe to remain in force; that the two firſt dayswere paſt; and that neither of the two firſt ſums were paid.

If a bond be to pay money by inſtalment, an action lies upon the firſt failure of payment.

The

(c) It may not be improper to obſerve in this place, that for two or three years paſt, the court of common pleas has been ſtrict, as to giving leave to plead ſeveral pleas. It is not at this day ſufficient in that court, that the pleas intended to be pleaded are all material: But the court expects to be ſatisfied of the neceſſity to plead ſeveral pleas, before a rule is made *to ſhew cauſe, why* they ſhould not be pleaded.

The queſtion was, Whether the action could be maintained?

It was holden that it might.

And by *Lee* Ch. J.—It has been ſaid; that the bond, as appears from the condition, was only to be in force on the failure of paying all the three ſums, the words, *or any of them*, not being inſerted in the condition; and it is inferred, that the preſent action is premature; becauſe it was brought before the laſt day of payment was paſt: But we are of opinion, that the preſent action is well brought, and that an action might have been brought upon the failure of paying the firſt ſum. In the caſe of *Coote* v. *Howell*, *Mich.* 18 G. 2. in this court, the condition of a bond, to pay money by inſtalments, was to the ſame purport as the condition of the preſent bond is; and it was in that caſe holden, that an action lay upon the failure of paying the firſt ſum.

Rex *verſ.* Owen.

A trial at bar put off: Becauſe the perſons upon the pannel for a ſpecial jury were not ſummoned in proper time.

AS very few of the perſons upon the pannel for a ſpecial jury, for trying an information at bar, anſwered to their names; and it appeared that they were not ſummoned, till nine in the evening of the day before the day fixed for the trial, the trial was put off.

And by *Lee* Ch. J.—If the perſons upon the pannel for a ſpecial jury have not notice thereof, ſuch a ſufficient time before the trial, as

as that they may be able to appear, the deſign of the party, upon whoſe application it was ordered, to have this cauſe tried by a ſpecial jury, will not probably be anſwered; and it is certain, that the perſons upon the pannel have not, in the preſent caſe, had ſuch notice.

Foſter J. added, that, in his opinion, ſix days notice at the leaſt ought to be given.

Kenrick *verſ.* Taylor.

The having repaired a pew is not neceſſary to be proved, in an action againſt a ſtranger, for being diſturbed in the enjoyment of the pew.

IN a caſe reſerved, in an action upon the caſe, it was ſtated; that the plaintiff had alledged in his declaration, that a certain pew in a church was appurtenant to an antient meſſuage; that the plaintiff and other occupiers of the meſſuage had conſtantly ſat in the pew; and that the defendant, who was a mere ſtranger, had diſturbed the plaintiff in the enjoyment of the pew: But it was further ſtated; that no evidence was given that the plaintiff, or any other occupier of the meſſuage, had at any time repaired to the pew, or that the occupier of the meſſuage for the time being was bound to repair it.

The queſtion was, Whether the action could be maintained?

It was holden, upon great conſideration, that it might.

And by *Lee* Ch. J.—It has been ſaid; that the plaintiff ought not to have alledged, that he and the other occupiers of the meſſuage had been uſed to repair the pew; for that in the caſe of *Dawney* v. *Dee*, *Cro. Ja.* 605. *Trin.* 18 *Ja.* 1. an uſage to repair the pew is alledged,

ledged, in an action for being diſturbed in the enjoyment thereof: But in the caſe of *Aſhley* v. *Freckleton*, 3 *Lev.* 73. *Mich.* 34 *Car.* 2. which was many years ſubſequent to this caſe, it was holden, that if ſuch action be brought againſt the ordinary, in whom *prima facie* the right to all the pews in a church is, an uſage to repair the pew muſt be alledged: But that if ſuch action be brought againſt a ſtranger, it is ſufficient to alledge a poſſeſſion of the pew.

It has been ſaid; that if it were neceſſary for the plaintiff to alledge, that he and the other occupiers of the meſſuage had been uſed to repair the pew, it was neceſſary for him to prove, that he and they had been uſed to repair it, or at leaſt, that the occupier of the meſſuage for the time being was bound to repair it; and the caſe of *Buxton* v. *Bateman*, 1 *Sid.* 203. *Paſch.* 16 *Car.* 2. has been cited: Wherein it was holden, that the want of alledging in ſuch action an uſage to repair the pew, would be bad upon a demurrer; and the reaſon given, why it is not bad after a verdict, is, that it ſhall after a verdict be intended that the uſage was proved. But in the caſe already mentioned of *Aſhley* v. *Freckleton*. which was ſome years ſubſequent to this caſe, it is laid down generally; that it is ſufficient to alledge a poſſeſſion of the pew, in an action againſt a ſtranger for being diſturbed in the enjoyment thereof; becauſe the ſtranger is to be conſidered as a wrong-doer.

Upon the whole we are of opinion, that as the preſent action is againſt a ſtranger, it was not neceſſary for the plaintiff either to alledge, or to prove, that he or any other occupier of the meſſuage had at any time repaired the pew, or that the occupier of the meſſuage for the time being was bound to repair it.

Grove

Grove and Wife *verſ.* Hart.

A wife may join with her huſband, in an action for ſaying ſhe keeps a bawdy-houſe.

UPON a rule to ſhew cauſe why the judgment ſhould not be arreſted in an action upon the caſe, it appeared; that the action was brought for ſlanderous words ſpoken of the wife; namely, that *ſhe keeps a bawdy-houſe.*

The queſtion was, Whether the wife could join in an action for theſe words?

It was holden that ſhe might.

And by *Lee* Ch. J.—As a wife, as well as her huſband, is puniſhable for keeping a bawdy-houſe, a right of action for the ſpeaking of theſe words would have ſurvived to the wife; and conſequently it was proper for her to join in the action.

Trinity Term,

25 & 26 Geo. 2. 1752.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Rex *verſ.* Simons.

A verdict ſet aſide on account of its being contrary to the directions of the judge in a matter of law.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an indictment, it appeared from the report of *Foſter* J. that the charge in the indictment was, that the defendant did privily and unlawfully convey into the pocket of *Aſhley* the proſecutor three ducats, with a malicious and wicked intent, falſely to accuſe the ſaid *Aſhley* of having robbed the defendant of the ducats; that when the jurors came into court, to give their verdict, they mentioned to the judge a difficulty they were under, namely, that they were of opinion, that the defendant did put the ducats into *Aſhley's* pocket, but that they were alſo of opinion, that he did not do it with an intent to accuſe *Aſhley* of a robbery; that

that the judge thereupon directed the Jury, that they could not find the defendant guilty of the fact, without finding him guilty of the intent, and that they muſt either find him guilty of both, or acquit him; that a verdict was ſoon after given, which was taken and entered by the officer, and underſtood by the judge to be a general verdict of guilty; and that from the time of the coming of the jurors into court, to the time of giving the verdict, there was a great crowd and noiſe in court.

An affidavit was likewiſe read, in which it was ſworn by all the jurors; that there was a miſtake in taking and entering the verdict; that they had agreed to find the defendant guilty of the fact, but without any evil intention; that one of them called out aloud, at the time of giving the verdict, *no intent, no intent*; and that the crowd and noiſe in court were ſo great, that they did not hear what the learned judge ſaid, when they mentioned the difficulty they were under.

The rule was made abſolute.

And by *Lee* Ch. J.—The court does not ſet aſide this verdict, on account of an afterthought of the jurors; for it would be a precedent of a moſt dangerous tendency, to ſet aſide a verdict on that account: But as it appears from the report of the judge, as well as from the affidavit of the jurors, that they did not hear, or did not underſtand his direction, which was, in our opinion, a very proper one, the verdict ought not to ſtand; becauſe it is contrary to the direction of the judge in a matter of law. It is very clear, from their having mentioned the difficulty they were under to the judge, before they gave their verdict, and from the calling out of one of them

at the time of giving it, *no intent*, *no intent*, that the jurors did not mean to find the defendant guilty of the intent; and if they did not, they ought, purſuant to the direction of the judge, to have acquitted him.

And by *Deniſon* J.—If the verdict had been taken as the jurors intended to give it; namely, guilty of the fact, but without any evil intention, it would have been an incompleat verdict, and conſequently, no judgment could have been given upon it.

Rex *verſ.* The Mayor and Burgeſſes of Nottingham.

A *Mandamus* for reſtoring to an office need not ſhew the nature of the right to the office.

A *Mandamus* had been awarded; whereby, after reciting, that, for time whereof the memory of man is not to the contrary, there has been, and that there ought to be, in the town of *Nottingham*, a common-council, conſiſting of twenty-four perſons, and that there are now ſix vacancies in the common-council, the defendants were commanded to elect ſix perſons to fill up the vacancies.

The return to this *Mandamus* was; that there ought not to be, in the town of *Nottingham*, a common-council conſiſting of twenty-four perſons.

Upon a rule to ſhew cauſe, why the *Mandamus* and the return thereto ſhould not be quaſhed?

It was holden, that neither the *Mandamus* nor the return ought to be quaſhed.

And

And by *Lee* Ch. J.—As a ground for quaſhing this *Mandamus*, it has been ſaid; that the nature of the right, to have a common-council conſiſting of twenty-four perſons, is not ſet out with ſufficient particularity: But divers precedents of *Mandamus* have been produced, in which the right, to have the thing commanded, done, is ſet out as generally as it is in the preſent *Mandamus*; and it is certain, that no preciſe form is neceſſary in a *Mandamus*.

As a ground for quaſhing the return to this *Mandamus*, it has been ſaid; that no other iſſue can be taken thereon, than whether there ought to be a common-council, in the town of *Nottingham*, conſiſting of twenty-four perſons, which, it being rather a queſtion of law than of fact, is more proper for the determination of the court than of a Jury: But as the queſtion, whether there ought to be ſuch a common-council, muſt depend upon a fact; namely, whether there has been an uſage in the town of *Nottingham* to have ſuch a common-council, it is a queſtion proper for the determination of a jury.

Rex *verſ.* The Mayor and Aldermen of Doncaſter.

The particular cauſe of being removed from an office in a corporation muſt be ſhewn, in the return to a *Mandamus* for reſtoring to the office.

TO a *mandamus*, for reſtoring *John Beale* to the office of alderman of the borough of *Doncaſter*; the return was; that *John Beale* was not reſident in the borough at the time of his election, but lived at the diſtance of three miles from thence, and has not ſince reſided in the borough; that from the day of his election, which was on the 9th day of *December* 1750, to the 26th day of *December* 1751, he abſented himſelf from the borough, and

and neglected and omitted the duty and execution of his office; and thereby, during that time, deprived the mayor and common-council of the aſſiſtance and advice, which by the duty of his office, and obligation of his oath, he ought to have given; contrary to the true intention, direction and effect of the charters of the borough; to the great hinderance and delay of the public buſineſs, and of the good rule and order of the borough; and to the great damage, diſappointment and prejudice of the corporation; that *John Beale*, being preſent in a common-council, was charged with, and accuſed of, the non-reſidence, non-attendance, neglect of duty and miſbehaviour aforeſaid, and aſked what he had to ſay, why he ſhould not be removed from his office; that upon his not denying the charge, nor offering any thing in his defence, nor deſiring a further day to anſwer, the common-council removed him from his office, for his non-reſidence, non-attendance, neglect of duty and miſbehaviour aforeſaid; and that therefore they cannot reſtore him.

This return was, upon great conſideration, holden to be inſufficient; and a peremptory *mandamus* was awarded.

And by *Lee* Ch. J.—It does not appear from this return; that a power of removing from an office for good cauſe is veſted in the common-council. Such a power is, indeed, incidental to every corporation: But it never can be exerciſed by a part of a corporation, unleſs it is veſted in that part by charter or preſcription.

If it had appeared from this return; that a power of removing from an office for good cauſe is veſted in the common-council, the cauſe returned for the removal of *Beale* is not

not a good one. As *Beale* reſided ſo near the borough, that he might attend the duty of his office, and as it does not appear that more than one common-council, at which he did attend, was holden whilſt he was in the office of alderman, there was not ſuch a total deſertion of the duty of his office, as was a good cauſe of removal; and it would be very ſtrange to hold, that the reſiding two or three miles out of the borough, which officers of a corporation frequently do, is a good cauſe of removal from an office.

In the caſe of *Rex* v. *The Mayor of Newcaſtle*, *Mich.* 21 *G.* 2. the officer removed had been abſent from the corporation twenty-two years, and reſided at the diſtance of two hundred miles from the borough; which being conſidered as a total deſertion of the duty of his office, it was holden to be a good cauſe of removing him from his office.

This return is bad for another reaſon; namely, that it does only charge a general neglect and omiſſion by *Beale* of the duty of his office; whereas it ought to have ſhewn the particular inſtances of neglect and omiſſion, that the court might have judged, whether ſuch neglects and omiſſions are a good cauſe of removal.

In the caſe of *Rex* v. *The Mayor, Aldermen and Burgeſſes of Doncaſter*, Lord *Raymond* 1566. the return to a *mandamus* for reſtoring *Scot* to an office was; that *Scot* had obſtinately, and voluntarily, refuſed to obey ſeveral orders and laws made for the good of the borough, contrary to the duty of his office. This return was holden to be inſufficient; becauſe it did not ſhew the particular orders or laws, which *Scot* had refuſed to obey.

It

It has been ſaid; that *Beale* was incapable of being elected an alderman, on account of his non-reſidence in the borough at the time of his election; and that therefore he ought not to be reſtored: But as he was in fact elected, it is not a good return to a *mandamus* for reſtoring him, to ſay that he was incapable of being elected. The proper way of trying, whether he was capable of being elected, being in an information in the nature of a *quo warranto*.

Perkins and Another, Aſſignees of Hughes *verſ.* Smith.

A ſervant is anſwerable for a tortious act done for the benefit of his maſter, although it be done by the command of his maſter.

IN a ſpecial verdict, in an action of *trover*, it was ſtated; that the defendant was a riding clerk to *Garraway*, a tradeſman; that he went to the houſe of *Hughes*, in order to receive ſome money due from *Hughes* to *Garraway*; that *Hughes*, before the defendant went to his houſe, had abſconded; that his ſhop was at that time ſhut up, and that he was afterwards declared a bankrupt; that after *Hughes* had committed an act of bankruptcy, but before he was declared a bankrupt, he delivered certain goods which were in his houſe to the defendant, who removed the goods from the houſe of *Hughes*, and ſold them for the uſe of *Garraway*; that the defendant afterwards accounted to the aſſignees of *Garraway*, who likewiſe became a bankrupt, for the money ariſing from the ſale of the goods; and that in all theſe tranſactions the defendant acted as ſervant to *Garraway*, and not otherwiſe.

The queſtion was, Whether the plaintiff ought to recover the value of the goods?

It

It was holden, upon great conſideration, that they ought.

And by *Lee* Ch. J.—As the property in the goods was, upon *Hughes*'s being declared a bankrupt, veſted in the aſſignees from the time of his committing the act of bankruptcy, the delivery of them to the defendant was a mere nugatory act. It is equally a converſion, to ſell the goods of another perſon, which have been delivered to the ſeller by one not having a lawful authority to deliver them, as it is to take the goods of the other perſon and ſell them; and it makes no difference, that the goods are, in ſuch caſe, ſold for the benefit of a third perſon; the owner being as much deprived of his goods, as if they had been ſold for the benefit of the ſeller.

It has been ſaid; that as the verdict finds, that the defendant in all the tranſactions ſtated acted as ſervant to *Garraway*, and not otherwiſe, he is not liable to the preſent action; the remedy of the plaintiffs being againſt *Garraway* or his aſſignees; But it is not found; that the ſale of the goods, which was certainly a tortious act, was by the command of *Garraway*; and if it had been ſo found, the defendant would be nevertheleſs liable to the preſent action.

If a ſervant, by the command of his maſter, do a tortious act, the maſter is certainly liable to an action: But as the command of a maſter does neither juſtify nor excuſe his ſervant in doing a tortious act, the ſervant is alſo liable. In the caſe of *Michael* v. *Aleſtree and another*, 2 *Lev.* 172. which was an action againſt a ſervant and his maſter, for an injury done by the ſervant's driving a pair of unruly

And it was added thereto, by order of the court; that the defendant ſhould have leave to imparle, until there is a determination upon the writ of error.

Rex *verſ.* Collyer and Capon.

A perſon may be diſcharged upon a *Habeas Corpus* from impriſonment under an illegal judgment.

THE defendants being brought up by a *Habeas Corpus*, it appeared; that they were committed by an order of a court of quarter ſeſſions, holden at *Hicks*'s Hall; and that in the commitment there were the following words: "*William Collyer* and *Edmund* "*Capon*, being convicted upon an indictment "for aſſaulting *Thomas Smith*, Eſq; are com- "mitted to *New Priſon*, *Clerkenwell*, for the "ſpace of one month next enſuing; and to "aſk pardon upon their knees of the ſaid "*Thomas Smith*, at the place where the of- "fence was committed; and to cauſe an ac- "count of the ſaid ſentence to be printed in "the *Daily Advertiſer*; and not to be diſ- "charged out of priſon, until they have un- "dergone ſuch impriſonment, aſked ſuch "pardon, and cauſed ſuch account to be pub- "liſhed; and when diſcharged, to pay their "fees ſeverally, one pound, one ſhilling and "eight pence."

A rule was made for the diſcharge of the defendants.

And by the court—Every part of this judgment is illegal, except the impriſonment. It has been ſaid; that the proper way for the defendants to be relieved againſt any part of this judgment, is by a writ of error: But it would be very hard; that the defendants ſhould continue in priſon under the illegal parts of this judgment, until they can obtain a reverſal of thoſe parts upon a writ of error.

Commins

Commins *verſ.* The Mayor and Burgeſſes of Oakhampton.

A father is an admiſſible witneſs to prove a cuſtom, under which his ſon claims the freedom of a corporation.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an action upon the caſe, it appeared; that the action was, for refuſing to admit the plaintiff to the freedom of the corporation of *Oakhampton*; that at the trial of the cauſe the chief queſtion was, whether there was a certain cuſtom in the borough, under which the plaintiff claimed a right of being admitted? And that the father of the plaintiff, who had obtained his freedom by ſervitude, was not admitted to prove this cuſtom.

The queſtion was, Whether the father was an admiſſible witneſs to prove this cuſtom?

It was holden that he was.

And by *Lee* Ch. J.—The perſon, to whom the remainder of an eſtate is, after the determination of a particular eſtate limited by a will, cannot be admitted to prove the will; becauſe he has, although it be remote, a veſted intereſt in the matter in queſtion: But it has been always holden; that the ſon of the perſon, to whom a particular eſtate is deviſed by a will, may be admitted to prove the will; becauſe, although he may be under a bias, he has not a veſted intereſt in the matter in queſtion. Mere relationſhip, how near ſoever the relation may be, does not go to the competency of a witneſs, unleſs there be a veſted intereſt in the matter in queſtion. The bias, which a father is preſumed to be under in giving teſtimony in favour of his ſon, does certainly go to his credit: But a father is, in all caſes, a competent witneſs for his ſon, if he have

An abſolute rule was made for an attachment.

And by *Lee* Ch. J.—There are two caſes, in which the court does always make a rule for an attachment, without making a rule to ſhew cauſe; namely, for non-payment of coſts which have been taxed, and for ſpeaking diſreſpectful words of the court.

Watkins *verſ.* Hybert.

The changing of the *Venue* from an *Engliſh* to a *Welch* county refuſed.

A Motion was made to change the *Venue*, in an action of aſſault and battery, from the county of *Middleſex* to the county of *Brecknock*.

The court refuſed to make a rule to ſhew cauſe.

And by *Lee* Ch. J.—It has been ſaid; that rule, for changing the *Venue* from an *Engliſh* to a *Welch* county, was made in the caſe of *Price* v. *Griffith*, *Trin.* 21 & 22 *G.* 2. and that another rule of the ſame kind was made in the caſe of *Smith* v. *Jones*, *Eaſt.* 23 *G.* 2. But if ſuch a rule has ever been made, it muſt have been by ſurprize.

Mr. *Ford*, as *Amicus Curiæ*, mentioned the caſe of *Moor* v. *Fernihaugh*, *Trin.* 19 *G.* 2. in which this court, after taking time to conſider, refuſed to make a rule for changing the *Venue* from an *Engliſh* to a *Welch* county.

Wicker

Wicker *verſ.* Woodhall.

A declaration delivered to a priſoner is bad, unleſs a bill has been filed.

UPON a rule to ſhew cauſe, why the proceedings ſhould not be ſet aſide for irregularity; and why the defendant ſhould not be diſcharged out of priſon, it appeared; that at the time of delivering the declaration, which was delivered to the defendant in priſon, a bill was not filed.

The rule was made abſolute.

And by the court—A declaration againſt a defendant at large is good, although a bill has not been filed; becauſe, if the bringing of writ of error, or any other reaſon, make the filing of a bill neceſſary, one may be filed at any time: But a declaration againſt a defendant in priſon is bad, unleſs a bill has been filed, before it was delivered.

Armſtrong on the Demiſe of Warnhouſe *verſ.* Thruſtout.

The notice to appear to an action of Ejectment, muſt be to appear in the next term to that of which the declaration is.

UPON a rule to ſhew cauſe, why judgment ſhould not be entered againſt the caſual ejector, it appeared; that the declaration was of laſt *Hilary* term; and that the notice to appear was, to appear in the preſent term.

The rule was diſcharged.

And by *Lee* Ch. J.—It has been ſaid; that ſuch a notice to appear, as has been given in the preſent caſe, would be good in the court of Common Pleas: But, however that may be, it is the ſettled practice of this court,

The queſtion was, Whether a writ of error be a *ſuperſedeas* to a *ſcire facias* upon a judgment, before bail is put in?

It was holden that it is.

And by the court—Upon the delivery of a writ of error to the clerk of the errors, it becomes a *ſuperſedeas* to a *ſcire facias* upon a judgment; and it continues to be ſo for the ſpace of four days after the allowance of the writ; after which time, if the plaintiff in error has neglected to put in bail, it ceaſes to be a *ſuperſedeas*.

Michaelmas

Michaelmas Term,

26 Geo. 2. 1752.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Emmerſon *verſ.* Haſkins.

An affidavit, to explain the affidavit for holding to ſpecial bail, was not permitted to be read.

UPON a rule to ſhew cauſe, why the defendant ſhould not, upon filing common bail, be diſcharged out of cuſtody, it appeared; that in the affidavit of the plaintiff, upon which the defendant had been holden to ſpecial bail, it was ſworn; that the defendant was indebted to the plaintiff in the ſum of one hundred pounds, for converting and diſpoſing of divers goods, the property of the plaintiff, to his own uſe.

On the part of the defendant, an affidavit was offered, wherein it was ſworn; that the defendant, who was a cuſtom-houſe officer, had ſeiſed the goods mentioned in the plaintiff's affidavit,

affidavit, as being prohibited goods; and that the goods were depoſited in the king's warehouſe, from whence they could not be had without a writ of delivery.

The court would not permit the affidavit to be read; and the rule was diſcharged.

And by *Lee* Ch. J.—It has been ſaid; that the court of common pleas did in two inſtances allow affidavits to be read, to explain the affidavits for holding to ſpecial bail; and, in conſequence of the explanatory affidavits, did diſcharge the defendants out of cuſtody, upon entering common appearances, notwithſtanding the affidavits of the plaintiffs were poſitive to debts of ten pounds: But whatever may have been done by that court, it has been the conſtant practice of this court, ever ſince the ſtatute, by which an affidavit of debt of ten pounds is required, in order to hold to ſpecial bail, not to permit any affidavit to be read, either to contradict or explain the affidavit of the debt; and it is by no means proper, for the court to depart from its conſtant practice, although the adhering to it ſhould, in the preſent caſe, be attended with ſome inconvenience to the defendant.

Griffith *verſ.* Walker.

The *Venue* in an action againſt a ſheriff for a falſe return, may be laid out of the county of which the defendant is ſheriff.

IN the declaration, in an action upon the caſe, againſt the ſheriff of the county of *Radnor*, for a falſe return to a writ of *Scire Facias*, it was alledged; that the writ was delivered to the ſheriff at *Kingſton* in *Herefordſhire*, who then and there returned; that he had made known, *&c.* and the *Venue* was laid in the county of *Hereford*.

Upon

Upon a demurer to this declaration, the queſtion was, Whether, as this action is for a falſe return by the ſheriff of *Radnorſhire*, the *Venue* could be laid in any other county than that of *Radnor*.

It was holden that it might.

And by *Lee* Ch. J.—It has been ſaid; that as the office of ſheriff is local, every act done by a man, as ſheriff, muſt be done in the county whereof he is ſheriff: But this is a miſtake. A ſheriff cannot do a compulſory act out of the county whereof he is ſheriff: But he may make a return to a writ, or do any act which is not compulſory, out of that county. It appears from the caſe of *Gregſon* v. *Heather*, Lord *Raym.* 1455. that the aſſignment of a bail bond, it being a tranſitory act, may be made by a ſheriff out of the county whereof he is ſheriff; and it was in that caſe holden; that the *Venue*, in an action upon the bail bond, was well laid in the county wherein the bail bond was aſſigned.

It has been ſaid; that in the caſe of *Rex* v. *The mayor of Orford*, the court refuſed to change the *Venue*, in an action againſt the ſheriff of *Suffolk* for a falſe return to a *Mandamus*, from the county of *Suffolk* to another county: But the court did not in that caſe refuſe to change the *Venue*, becauſe the ſheriff could not make a return to the *Mandamus* out of his county; but becauſe the *Venue* was very properly laid in the county of *Suffolk*, in which county the return was, in fact, made.

In the preſent caſe, as the return is alledged to have been made, and muſt be proved to have

have been made, in the county of *Hereford;* the queſtion, whether the return be falſe, ought to be tried in that county; it being a maxim of law, that *ibi ſemper debit fieri triatio, ubi Juratores meliorem habere poſſunt Notitiam.*

If there had been a motion in the preſent caſe, to change the *Venue* from the county of *Hereford* to the county of *Radnor*, the court would not have made a rule for changing it: In caſe the plaintiff would have undertaken to give material evidence in the county of *Hereford;* which, as the delivery of the writ, and the making of the return, were both in that county, he might very well have done.

Griffith *verſ.* Williams.

If mutual actions will lie for the breach of two cuſtoms, one cuſtom is not to be conſidered as parcel of the other.

IN an action of *Treſpaſs*, for taking three gold rings, the defendant pleaded a cuſtom, for the corporation of *Oſweſtry* to keep the bulwarks and priſons of the borough of *Oſweſtry* in repair; and likewiſe a cuſtom, for the corporation to receive, in conſideration thereof, from every inhabitant of the borough not being a burgeſs, a duty not exceeding twenty ſhillings, called *Tanſtry;* and that he, as ſervant to the corporation, took the three rings, as a diſtreſs for the non-payment of this duty.

The plaintiff in his replication, traverſed the cuſtom of paying the duty; but did not give any anſwer as to the cuſtom of keeping the bulwarks and priſons in repair.

Upon a demurrer to this replication, it was holden to be good.

And

And by *Lee* Ch. J.—Some objections have been made to the defendant's plea, which ſeem to have weight in them: But as we are of opinion, that the replication is good, it is not neceſſary to give any opinion as to the goodneſs of the plea.

It has been ſaid, that, as the cuſtom to pay the duty, called *Taneſtry*, is alledged to be in conſideration of keeping the bulwarks and priſons in repair, the cuſtom to repair the bulwarks and priſons, and the cuſtom to pay this duty, are to be conſidered as one entire cuſtom; and if they are to be ſo conſidered, that the plaintiff ought to have traverſed that part of the cuſtom which relates to the repairs, as well as that part which relates to the payment of the duty. But we are of opinion; that the cuſtom to keep the bulwarks and priſons in repair, and the cuſtom to pay the duty, are to be conſidered as two diſtinct cuſtoms; inaſmuch as there are two diſtinct duties; namely, a duty upon the corporation to keep the bulwarks and priſons in repair, and a duty upon the inhabitants to pay the duty; that for the breach of theſe two cuſtoms the corporation and the inhabitants have mutual remedies; and conſequently, that it is not neceſſary for the perſon, who traverſes one cuſtom, to take any notice of the other.

In the caſe of *Harbin* v. *Green*, *Hob.* 189, a cuſtom was alledged; for all the inhabitants of a city to grind their corn at the mill of *J. S.* and another cuſtom, that in conſideration thereof, *J. S.* was obliged to grind all the corn of the inhabitants. It was holden; that theſe are two diſtinct cuſtoms for the breach of which mutual actions will lie. In *Gray's* caſe, 5 *Rep.* 78. it is laid down gene-

rally; that where there are mutual remedies for the breach of two cuſtoms, one cuſtom is to be conſidered as parcel of the other; but they are to be conſidered as diſtinct cuſtoms. It is likewiſe laid down in this caſe; that it is not neceſſary for the perſon, who would avail himſelf in pleading of one of two diſtinct cuſtoms, for the breach of which mutual actions will lie, to take any notice of the other cuſtom.

Tubb *verſ.* Tubb.

If a perſon, excepted to as bail do not juſtify; his name may be ſtricken out of the recognizance.

UPON a rule to ſhew cauſe, why the name of *John Dighton* ſhould not be ſtricken out of a recognizance, it appeared; that this recognizance was entered into by *Dighton* and *J. S.* as bail in a writ of error; that *Dighton* being excepted to, and unable to juſtify, another perſon was added as bail, who did juſtify; that the judgment in the original action was affirmed; and that the perſon added as bail and *J. S.* being both inſolvent, the defendant in error had brought an action upon the recognizance againſt *Dighton.*

The rule was made abſolute.

And by *Lee* Ch. J.—After the defendant in error had excepted to *Dighton*, and another perſon was added as bail, who did juſtify, the recognizance, as to *Dighton*, was at an end. If *Dighton* had applied before this action was brought againſt him, to have his name ſtricken out of the recognizance, the court would certainly have ordered it to be done; and it is equally reaſonable, that it ſhould be now done.

Daubuz

Daubuz *verſ.* Pender.

A Motion being made, for leave to amend the *Tranſcript* of a judgment of an inferior court, by the record of the judgment; and it being ſaid, that a rule giving ſuch leave, had been made in the caſe of *Read* v. *Charnley*, *Mich.* 4. *Ann.* the court ordered a ſearch to be made for that rule.

The *Tranſcript* of a judgment of an inferior court may be amended.

By the rule made in the caſe of *Read* v. *Charnley*, which was at another day produced, it was ordered; that the matter be referred to the maſter, and that he, in the preſence of the attornies of both parties, do amend the *Tranſcript* of the record to the writ of error annexed, according to the ſeveral proceedings had in the inferior court, to be produced before him by the parties.

A ſimilar rule was made in the preſent caſe.

Kelly *verſ.* Devereux.

UPON a rule to ſhew cauſe, why common bail ſhould not be accepted, it appeared; that the plaintiff, who reſided at *Cadiz*, had ſent a letter of attorney to *J. S.* whereby *J. S.* was impowered to receive, and, if neceſſary, to ſue for, a ſum of money due from the defendant to the plaintiff; that the defendant had been holden to ſpecial bail upon an affidavit of *J. S.* in which it was ſworn; that the defendant is indebted to the plaintiff in the ſum of fifty pounds, as appears to this deponent, by the confeſſion of the defendant, and by his promiſe to pay the ſame to this deponent.

An affidavit for holding to ſpecial bail muſt be poſitive to a debt of ten pounds.

The rule was made abſolute.

And by *Lee* Ch. J.—It is a ſettled point; that the affidavit for holding to ſpecial bail muſt, without any reference, be poſitive to a debt of ten pounds.

Adcock qui tam *verſ.* Gill.

IN an action *qui tam*, for exerciſing the trade of a worſted weaver, in the city of *Norwich*, contrary to the 13 & 14 *Ch.* 2. *c.* 5. there was a ſpecial verdict.

After this verdict had been argued once upon the merits, *Deniſon* J. deſired; that it might, at the next argument, be conſidered, whether the 13 & 14 *Ch.* 2. *c.* 5. which was made for regulating the manufacture of ſtuffs in the city of *Norwich* and in the county of *Norfolk*, be not a private ſtatute, of which, as it is not in the preſent caſe pleaded, the judges cannot take notice; and he mentioned the caſe of *Rex* v. *Wild*, 2 *Keb.* 686. in which it was agreed by the court, that this ſtatute is a private ſtatute.

At the day upon which the verdict was to have been argued a ſecond time, it was admitted; that the objection of Mr. Juſtice *Deniſon*, as ſupported by the caſe of *Rex* v. *Wild*, was too ſtrong to be got over; and conſequently that judgment muſt be entered for the defendant.

Rex

Rex *verſ.* Rook.

UPON a rule to ſhew cauſe, why an order of baſtardy, made by two juſtices, ſhould not be quaſhed, one objection was; that there was not an adjudication in the order, that the child was born in the pariſh, for the relief of which the order was made.

A married woman cannot be admitted to prove that her huſband had not acceſs to her.

This objection was over-ruled.

And by the court—It muſt appear in an order of baſtardy; that the child was born in the pariſh, for the relief of which the order is made, otherwiſe the order is bad for want of juriſdiction in the juſtices: But it has been holden frequently, and amongſt other caſes, in the caſe of *Rex* v. *Moravia*, *Eaſt.* 15 *G.* 2. that if it can be fairly collected, from an order of baſtardy, that the child was born in the pariſh, it is ſufficient; an expreſs adjudication thereof not being neceſſary. In the preſent caſe, there is a recital in the order, that the child was born in the pariſh, which is certainly ſufficient.

Another objection was; that the mother of the child, a married woman, was the only witneſs to prove, that her huſband had no acceſs to her. This objection was holden to be good, and the rule was made abſolute.

And by the court—According to the old caſes, a child born of a married woman could not be a baſtard, if her huſband were, during the time of her pregnancy, within the four ſeas: But it is at this day a ſettled point; that ſuch a child may be a baſtard, notwith-

notwithſtanding the huſband was, during the time of his wife's pregnancy, within the four ſeas, if it appear, that he had no acceſs to her.

But it is likewiſe a ſettled point; that the wife cannot be admitted to prove, that her huſband had no acceſs to her. Before the caſe of *Rex* v. *Redding*, which was *Mich.* 8 *G.* 2. it was doubted; whether a married woman could be admitted to prove, that a child born of her body was begotten by any other man than her huſband; inaſmuch as the tendency of the evidence was to baſtardize her child. It was in this caſe holden; that a married woman may, *ex neceſſitate*, be admitted to prove this; which can very ſeldom, if ever, be proved by any other perſon: But it was likewiſe holden; that a married woman cannot be admitted to prove, that her huſband had no acceſs to her; becauſe this may frequently be proved by another perſon.

Wood *verſ.* Lord Biron.

The *Teſte* of a *Diſtringas* may be amended by altering the date.

UPON a rule to ſhew cauſe, why the *Teſte* of a *Diſtringas* ſhould not be amended, by altering the date thereof, it appeared; that the *Diſtringas* bore *Teſte* upon the 29th day of *May;* and that the *Venire Facias*, upon which it was founded, was not returnable until the 31ſt day of the ſame month.

The rule was made abſolute.

And by *Lee* Ch. J.—It has been ſaid; that the *Diſtringas*, as it now ſtands, is a perfect writ; and that altering the date of the *Teſte* would amount to the making of a new writ: But there is no weight in this objection. The miſtake in the date of the *Teſte* of the *Diſtringas*,

tringas is a mere *vitiam Clerici;* for as the officer, by whom it was made out, had the *Venire Facias* before him, it was his duty to make it bear *Teſte* on a day ſubſequent to the return of the *Venire Facias.* In the caſe of *Nevil* v. *Bates*, *Telv.* 64. it was holden; that both the *Teſte* of a *Venire Facias*, and the *Teſte* of a *Diſtringas* founded thereupon, might be amended.

Hayley *verſ.* Grant.

UPON a rule to ſhew cauſe, why the trial of a cauſe ſhould not be put off, it appeared; that the attorney for the defendant was ſo ill, as not to be able to attend the trial.

The trial of a cauſe put off, becauſe the attorney for the defendant was ill.

The rule was made abſolute.

And by *Lee* Ch. J.—It has been ſaid; that there is no inſtance of a trial being put off, on account of the illneſs of the attorney for one of the parties: But, whether there be ſuch an inſtance or not, it would be contrary to natural juſtice; that a party ſhould be compelled to have his cauſe tried, when the attorney, who has all along had the management thereof, is prevented by ſickneſs from attending the trial.

Say *verſ.* Lord Biron.

UPON a rule to ſhew cauſe, why the proceedings againſt the defendant, who was a peer, ſhould not be ſet aſide, it appeared; that the ſuit was commenced by bill.

A ſuit againſt a peer may be commenced by bill

The

The queſtion being, whether a ſuit could be commenced againſt a peer by bill? It was referred to the maſter, in order to have his report as to the practice of the court. The maſter reported; that it had for many years been the practice of the court, to commence a ſuit againſt a peer by bill, and to declare againſt him, not as being in the cuſtody of the marſhal: But, which is done in the preſent caſe, as having privilege of parliament.

The rule was diſcharged.

And by *Lee* Ch. J.—It has been ſaid; that as the 12 & 13 *W.* 3. *c.* 3. by which ſtatute liberty is given of commencing a ſuit by bill, againſt perſons having privilege of parliament, does only mention *Knights, Citizens and Burgeſſes expreſsly*, the ſubſequent words, *or any other perſon having privilege of Parliament*, do not extend to a peer: Becauſe a peer is a perſon of rank ſuperior to all the perſons, who are expreſsly mentioned: But we are of opinion; that the practice of the court, which has for many years been eſtabliſhed, is founded upon a very right conſtruction of the ſtatute, and that it ought to be adhered to.

Jones qui tam *verſ.* Biſhop.

In an action for expoſing a hare to ſale, it is ſufficient to alledge, that the defendant had a hare in his poſſeſſion.

UPON a motion in arreſt of judgment, it appeared; that the action was for the penalty of five pounds given by the 9 *Ann.* *c.* 25. for *expoſing a hare to ſale;* and that the allegation in the declaration was; that the defendant, not being a perſon qualified in his own right to kill game, nor being entitled thereto, under any perſon ſo qualified, had a hare in his poſſeſſion.

The

The queſtion was, Whether this be a ſufficient allegation of the offence for which the penalty is given?

It was holden that it is.

And by *Lee* Ch. J.—It has been ſaid; that although evidence of the defendant's having had a hare in his poſſeſſion, would have been evidence of his expoſing a hare to ſale; yet, as the offence created by the ſtatute is *expoſing a hare to ſale*, it ought to have been alledged, that the defendant did *expoſe a hare to ſale:* but we are of opinion, that the allegation is ſufficient; it being enacted, by the ſecond paragraph of the ſtatute, "that if a hare ſhall be "found in the poſſeſſion of any perſon what-"ſoever, not qualified to kill game in his "own right, nor intitled thereto under ſome "perſon ſo qualified, the ſame ſhall be ad-"judged, deemed and taken to be an ex-"poſing thereof to ſale, within the true "intent and meaning of this act."

Rex *verſ.* Sheppard.

A Motion being made, upon the laſt day of this term, to quaſh the indictment againſt the defendant; *Lee* Ch. J. had at firſt ſome doubt, whether a motion to quaſh an indictment could be made upon the laſt day of a term: But the court being informed by the ſecondary of the crown office, that motions to quaſh indictments had frequently been made upon the laſt days of term, a rule to ſhew cauſe was made.

A motion to quaſh an indictment may be made upon the laſt day of a term.

The ſecondary did, at the ſame time, inform the court, that motions to quaſh orders of ſeſſions, or orders of juſtices of the peace, had not been allowed to be made upon the laſt days of terms.

Hilary

Hilary Term,

26 Geo. 2. 1753.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Goodlittle on the Demiſe of Hord *verſ.* Stokes.

IN a caſe reſerved in an action of ejectment it was ſtated; that *A. B.* being ſeiſed in fee of the premiſes in queſtion, conveyed them by leaſe and releaſe to truſtees, to the uſe of himſelf and *C. D.* his wife for life, and after the deceaſe of the longer liver of them, to the uſe of all and every the children of *J. S.* on the body of the ſaid *C. D.* begotten and to be begotten, and the heirs and aſſigns of ſuch children, equally to be divided amongſt them; and that *A. B.* who ſurvived the ſaid *C. D.* is dead, and has left two children begotten upon the body of the ſaid *C. D.*

A tenantcy in common is created by the words equally to be divided, in a deed to uſes.

The queſtion was, Whether the two children took as tenants in common, or as joint tenants?

It was holden; that they took as tenants in common.

And by *Lee* Ch. J.—It has been for ſome time a ſettled point, that if a deviſe be to two, equally to be divided betwixt them, they take as tenants in common.

It has been obſerved; that the intention of the grantor is not ſo much to be regarded in the conſtruction of a deed at the common law, as the intention of the teſtator is in the conſtruction of a will: But this obſervation, ſuppoſing it to be well founded, does not apply to the preſent caſe, in which the queſtion ariſes upon a deed to uſes, and not upon a deed at the common law.

In the caſe of *Leigh* v. *Brace*, *Carth.* 343. it is laid down; that as much regard is to be had to the intention of the grantor in conſtruing a conveyance to uſes, as in conſtruing a will; for that the ſame ſtrictneſs is not required in the conſtruction of a conveyance to uſes, as in the conſtruction of a conveyance at the common law.

In the caſe of *Fiſher* v. *Wegg*, Lord *Raym.* 622. it was holden by the opinion of *Turton* J. and *Gould* J. that if a man ſurrender a copyhold eſtate to the uſe of *A. B. C.* and *D.* his children, equally to be divided amongſt them and their reſpective heirs and aſſigns for ever, the children take as tenants in common.

It

It has been truly ſaid, that *Holt* Ch. J. did in this caſe differ in opinion from *Gould* and *Turton:* But the difference did not conſiſt, in his being of opinion, that the intention of the grantor is not to be regarded in the conſtruction of a deed to uſes; but in his being of opinion, that a ſurrender of a copyhold eſtate ought to be conſtrued in the ſame manner as a grant at the common law.

In the caſe of *Rigden* v. *Vallier*, *March* 25, 1751, in the court of Chancery, it appeared; that *J. S.* had executed a deed, in which were the following words, " In conſideration " of natural love and affection to my wife " and two daughters, and for the ſettling and " aſſuring all my real and perſonal eſtate " upon them, I give, grant and confirm unto " my two daughters the rents and profits of " my eſtate, during the life of my wife, " equally to be divided between them, pay- " ing five pounds a year to my wife, my ſaid " two daughters to have the ſaid eſtate to " them and their heirs for ever, equally to " be divided between them." That the wife died during the life of *J. S.* and that the two daughters both ſurvived *J. S.*

The decree in this caſe was, that the two daughters took as tenants in common, and by Lord *Hardwicke*, Chancellor; as the eſtate thereby created was to take effect *in futuro*, and there was no livery, this deed cannot operate as a grant at the common law: Becauſe no eſtate of freehold, to commence *in futuro*, can be created by grant at the common law, unleſs there be livery. As the eſtate thereby granted, was not to take effect until the death of the grantor, this deed may, perhaps, operate as a teſtamentary ſchedule; and, if it may,

may, there is no room for doubt, that the intention of the teſtator is to be regarded in the conſtruction thereof. If this deed do not operate as a teſtamentary ſchedule, it muſt operate as a covenant to ſtand ſeiſed; the conſideration therein expreſſed being natural love and affection; which is not a good conſideration in any other deed than a covenant to ſtand ſeiſed. If it do operate as a covenant to ſtand ſeiſed, it is a ſtronger caſe for holding that the intention of the grantor ought to be regarded in conſtruing it, than the caſe of *Fiſher* v. *Wegg*, which has been cited and relied upon. It is indeed ſaid, in *Eq. Ca. Abr.* 291. that the judgment in the caſe of *Fiſher* v. *Wegg* was reverſed: But this is a miſtake, for upon a ſearch being made by my order it does not appear, that any writ of error was brought.

It has been ſaid; that as the determination in the caſe of *Fiſher* v. *Wegg* was contrary to the opinion of *Holt* Ch. J.—that caſe is not of much authority. The anſwer I ſhall give to this is, that, although I have the greateſt reverence for the opinions of Lord Chief Juſtice *Holt*, I cannot help ſaying; that upon mature conſideration of the arguments in the caſe of *Fiſher* v. *Wegg*, it appears to me, that the arguments of the chief juſtice are very artificial and refined: But that thoſe of the two juſtices are much more agreeable to natural reaſon. If the intention of *J. S.* is to be regarded in conſtruing this deed, the conſtruction of it muſt be, that the daughters took as tenants in common; for if the conſtruction ſhould be, that they took as joint-tenants, the intention of *J. S.* which certainly was to provide for the heirs of his daughters, as well as for the daughters themſelves, would not be anſwered.

It

It appears from theſe authorities, that the intention of the grantor is to be regarded in the conſtruction of a deed to uſes; and if this be ſo, there is not in the preſent caſe any room for doubt; it being the manifeſt intention of *A. B.* that the heirs and aſſigns of all his children begotten upon the body of *C. D.* ſhould take, as well as the children themſelves. In order to effectuate this manifeſt intention, it is neceſſary for the court to hold, that the two children left by *A. B.* took as tenants in common; for if it ſhould be holden, that they took as joint tenants, only the heirs and aſſigns of that child which ſhould ſurvive could take.

It is not neceſſary, to go further in the preſent caſe, than to determine, that the words *equally to be divided*, in a deed to uſes, do create a tenancy in common: But if it were neceſſary, the court would have the ſanction of a very great man's opinion for going further.

In the caſe of *Rigden* v. *Vallier*, which has been already mentioned, the only point directly in queſtion was, whether the words equally to be divided in a teſtamentary ſchedule, or a covenant to ſtand ſeiſed do create a tenancy in common; and conſequently the decree could only be as to this point: But it may be fairly inferred, that, if the caſe had required it, the decree would have been, that the ſame words, or words of the like import, in a deed at the common law, do create a tenancy in common: For Lord *Hardwicke* expreſſed himſelf to the following purport: I take it to have been long ſettled, that the words equally to be divided, or the word equally, or the words ſhare and ſhare alike, in a will, do create a tenancy in common; and I do not know of any ſolemn determination, that the

ſame

ſame words, or words of the like import, in a deed, do not create ſuch a tenancy. It is certain, that no technical words are neceſſary to the creation of a tenancy in common; and conſequently, a greater latitude may be exerciſed in determining, whether ſuch a tenancy be created by the words which are uſed. It is ſaid, 1 *Inſt.* 190, *B.* that if a verdict find, that a man hath *duas Partes Manerij in tres Partes dividendas*, it ſeemeth, that he is a tenant in common by the intendment of the verdict. If theſe words in a ſpecial verdict would create a tenancy in common by intendment, there does not appear to be any good reaſon, why the ſame words, or words of the like import, in a deed at common law, ſhould not create ſuch a tenancy. Upon looking into all the caſes upon the point, and upon the beſt conſideration I have been able to give it, I I am inclined to be of opinion, that the words equally to be divided, or any words of the like import, whether in a will or in a deed, at the common law, do create a tenancy in common.

Rex *verſ.* Bridges.

The affirmation of a Quaker is not to be admitted in criminal proceeding.

UPON a motion to revive an attachment, the affirmation of a Quaker was offered, to ſhew the right of the aſſignees of a bankrupt to ſome money awarded by arbitrators to be paid.

The affirmation was not permitted to be read.

And by the court—The affirmation of a Quaker is not to be admitted in any criminal proceeding whatſoever.

Macliſh

Macliſh *verſ.* Ekins.

The property in a navy bill cannot paſs without an aſſignment of the navy bill.

IN a caſe reſerved, in an action of *Trover*, it was ſtated; that the plaintiff, being owner of a ſhip, let it to the commiſſioners of the navy; that the plaintiff, who reſided in *Scotland*, by a letter of attorney empowered *Todd*, who reſided in *London*, to receive all freight and profits due to him as owner of the ſhip, to give diſcharges for the ſame, and do every thing relative to the premiſes, which the plaintiff himſelf could lawfully do; that *Todd* received from the commiſſioners of the navy a navy bill for twelve hundred pounds, to be paid to the plaintiff and his aſſigns; that *Todd*, after having pawned the navy bill to *Honywood* and *Fuller*, ordered their clerk to ſell it, and place the money ariſing from the ſale to his account; that the clerk ſold it to *Hawkes* at a fair market price, and placed the money to *Todd's* account; that *Hawkes* ſold it to the defendant at a fair market price; that *Todd*, in a bill of ſale of his goods, which he afterwards executed to the defendant, called himſelf agent for the plaintiff; and, after reciting the ſale of the navy bill to the defendant, gave him full power to receive the money thereupon due, and covenanted to maintain his claim thereto againſt all perſons whatſoever; and that the action was for the converſion of the navy bill.

The queſtion was, Whether *Todd* had an authority, either to pawn or ſell the navy bill?

It was holden that he had not.

And by the court—It has been ſaid; that *Todd* had an intereſt in the navy bill, as well

as an authority to receive it: But we are of opinion, that he was only empowered by the letter of attorney to act as agent for the plaintiffs.

It has been ſaid; that if *Todd*, inſtead of a navy bill, had received money, and paid it away, the plaintiff could not have recovered the money from the perſon to whom it was paid: But the reaſon why the plaintiff could not have recovered in that caſe is, that money has no ear-mark, and not that *Todd* would have had a right to pay it away; for, as the money would have been received for the uſe of the plaintiff, the paying of it away by *Todd* would have been unlawful.

It has been very truly ſaid; that the property in a bank note, if delivered in the courſe of trade for a valuable conſideration, does paſs by the delivery: But it is as true; that the property in a navy bill cannot paſs without aſſignment, and as *Todd* had no power to aſſign the navy bill, the maxim *Caveat emptor* applies to this caſe. The defendant could not be ignorant of *Todd* being an agent for the plaintiff, for he is ſo called in the bill of ſale to the defendant; and it appears, from the covenant entered into by *Todd*, which was to maintain the claim of the defendant to the navy bill againſt all perſons whatſoever, that the defendant did himſelf doubt of *Todd's* authority to diſpoſe thereof.

Battie *verſ.* Brown.

A miſtake in the declaration is not a good excuſe for not trying a cauſe purſuant to an undertaking.

AFTER one rule to ſhew cauſe, why there ſhould not be judgment as in the caſe of a non-ſuit, had been diſcharged upon an undertaking peremptorily to try the cauſe at the next aſſizes, a ſecond rule was made

made to ſhew cauſe, why there ſhould not be ſuch judgment.

Upon ſhewing cauſe againſt this rule, it appeared; that after the undertaking to try the cauſe at the next aſſizes, a miſtake had been diſcovered in the declaration, which was for the ſale of a gelding; whereas the fact was, that the plaintiff had ſold a mare to the defendant; that as this miſtake was diſcovered, and there was no count for goods ſold, the cauſe was not tried; and that notice had been given, before the preſent rule was moved for, of a motion for leave to amend the declaration.

The rule was made abſolute.

And by *Wright* J. and *Deniſon*, J. (*Lee* Chief Juſtice being abſent)—The plaintiff ought to have been ſatisfied, that this declaration was right, before he undertook peremptorily to try the cauſe.

But *Foſter* J. ſaid; that it would, in his opinion, be rather too rigid a conſtruction of the ſtatute to hold, that the plaintiff, under the circumſtance of this caſe, was obliged to try his cauſe at the next aſſizes.

Rex *verſ.* Bow.

UPON a rule to ſhew cauſe, why an attachment ſhould not be awarded for non-performance of an award, the affirmation of a Quaker was offered on the part of the defendant.

The affirmation of a Quaker is not to be admitted in a criminal proceeding in exculpation of the defendant.

It was not permitted to be read.

And by the court—It has been ſaid; that this affirmation is in exculpation of the defendant: But the affirmation of a Quaker can no more be admitted on the part of the defendant, on ſhewing cauſe againſt the preſent rule, than it could upon the part of the proſecutor, upon the motion for the rule.

Tourville *verſ.* Naſh.

The iſſue and *Niſi Prius* roll may be amended by the plea roll.

UPON a rule to ſhew cauſe, why the iſſue delivered. and the *Niſi Prius* roll ſhould not be amended, the queſtion was, Whether both theſe ſhould be amended, by the plea roll, by ſtriking out the words, *in a Plea of Treſpaſs upon the Caſe*, and inſerting the words *in a Plea of Debt?*

It was holden; that both might be amended by the plea roll.

Rex *verſ.* Bedell.

An abſolute rule for the production of the book of a corporation at the trial of an information.

UPON an affidavit that there were many interlineations and obliterations in a book of a corporation, wherein entries relative to elections were made, an abſolute rule was made, for the production of the book at the trial of an information in the nature of a *Quo Warranto.*

And by the court—It is neither uſual, nor reaſonable, to make a rule to ſhew cauſe in a caſe like the preſent.

Anonymous.

Anonymous.

UPON a motion to change the *Venue*, it did not appear from the affidavit, that the cauſe of action, if any, did not ariſe elſewhere out of the county, to which the motion was to change its *Venue*.

The form of an affidavit for changing the *Venue*.

The affidavit was holden to be inſufficient.

And by the court—In order to change the *Venue*, it muſt appear from the affidavit, that the cauſe of action, if any, does ariſe in the county to which the motion is to change it, and not in the county where the *Venue* is laid, or elſewhere out of the county to which the motion is to change it; for the cauſe of action may ariſe out of the realm; in which caſe the *Venue* ought not to be changed; becauſe the action may as well be tried in the county where the *Venue* is laid, as in any other county where the cauſe of action did not ariſe.

Anonymous.

UPON a rule to ſhew cauſe, why the judgment ſigned ſhould not be ſet aſide for irregularity, it appeared; that the judgment was ſigned; becauſe the plaintiff, who was an attorney, refuſed to pay for the plea.

An attorney is not bound to pay for the plea, in a cauſe wherein he is plaintiff.

The rule was made abſolute.

And by the court—An attorney is not obliged to pay for the plea in a cauſe, wherein he is himſelf plaintiff.

Anonymous.

Anonymous.

A Rule was made abſolute, for an information againſt the pariſh officers of *Cheltenham*, for forcibly entering a woman's houſe, and removing her ſon who was ill of the ſmall pox, when the diſtemper was almoſt at the heighth; by which the ſon was much frighted, and before his death, which happened ſoon after the removal, declared, that if he ſhould die, the removal would be the cauſe of his death.

Pike *verſ.* Corbin.

UPON a motion to ſtay the proceedings, until ſecurity ſhould be given for the payment of coſts, in caſe the defendant ſhould become entitled to any, it appeared; that the action, which was for the meſne profits of the premiſſes recovered in an action of ejectment, was brought in the name of the nominal plaintiff in the action of ejectment.

A rule was made to ſhew cauſe, which, no cauſe being ſhewn, was afterwards made abſolute.

Cranſton *verſ.* Clarke.

The land-tax may be deducted by a tenant, unleſs there be an expreſs agreement that it ſhall not.

IN a caſe reſerved, in an action of covenant, it was ſtated; that the rent reſerved in a leaſe was to be paid without any deduction or abatement whatſoever.

The queſtion was, Whether the leſſee had a right to deduct out of the rent the money paid by him for the land tax?

It was holden that he had.

And by the court—As every tenant is enabled by the land tax act, to deduct the money paid for the land tax out of the rent paid to his landlord, this money may always be deducted, unleſs there is an expreſs agreement that it ſhall not.

Rex *verſ.* The Burgeſſes of Caermarthen.

IN order to obtain a trial at bar, it was alledged in an affidavit; that the cauſe is expected to be long and difficult; and that the matter in queſtion is of great value.

A trial at bar ought not to be granted upon a general allegation of difficulty in the cauſe.

The affidavit was holden to be inſufficient.

And by the court—The granting of a trial at bar is entirely in the diſcretion of the court, and ſuch a trial ought not to be granted without good reaſon: Becauſe it is very expenſive to the parties, and the buſineſs of the other ſuitors is thereby delayed. Neither the length of a cauſe, nor the value of the matter in queſtion, is a ſufficient ground for granting a trial at bar; and in order to obtain one upon the account of difficulty, it is not ſufficient to ſay generally in an affidavit that the cauſe is expected to be difficult: But the particular difficulty which is expected to ariſe ought to be pointed out, that the court may judge, whether it be ſufficient for the granting of a trial at bar.

Eaſter Term,

26 Geo. 2. 1753.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Catling *verſ.* Bowling.

Leave given to bring a book into court in an action of *Trover.*

UPON a motion for leave to bring a book into court, for the converſion of which an action of *Trover* was brought, it appeared; that the book, entitled *Memoirs of a Woman of Pleaſure*, had been lent by a bookſeller to ſome young ladies at a boarding ſchool; that the defendant's wife, who was miſtreſs of the ſchool, took it from them and ſent it to the bookſeller, with a requeſt that it might not be again lent to the young ladies; and that the book being afterwards found in the poſſeſſion of one of the young ladies, the defendant's wife took it from her and kept it.

A rule

A rule was made to ſhew cauſe, why, upon bringing the book into court, the proceedings ſhould not be ſtayed; and it is probable, that the plaintiff thereupon agreed to drop his action; for the court never heard any more of the rule.

Adams *verſ.* Freeman and Wynne.

IN an action of *Treſpaſs*, the plaintiff declared in one court, for an aſſault and falſe impriſonment for the ſpace of fourteen days; and in another, for an aſſault and falſe impriſonment for the ſpace of three months.

It is not neceſſary to ſet out the proceedings in an inferior court, in a plea to an action of treſpaſs in a ſuperior court.

The defendant *Freeman* pleaded in his juſtification, that a plaint was levied and proceſs prayed at his ſuit in an inferior court, that ſuch proceedings were thereupon had, that a *Capias* was awarded; that the plaintiff, by virtue of this *Capias*, was arreſted and detained in cuſtody fourteen days; and that he was then brought into court, and committed for the reſidue of the term of three months.

The other defendant, who was the officer by whom the arreſt was made, pleaded a like plea in his juſtification.

Upon a demurrer to theſe pleas, the queſtion was, Whether it was neceſſary for both or either of the defendants to ſhew, that a ſummons iſſued before the *Capias* was awarded?

The pleas were both holden to be good.

And by *Lee* Ch. J.——It was heretofore neceſſary, for the plaintiff in an action in the inferior court, who would juſtify an impriſonment under a *Capias* awarded by that court, to ſet out in his plea of juſtification, all the proceedings anterior to the awarding of the *Capias:* But it was never neceſſary, for the officer by whom the arreſt was made to do this. It has, however, for ſome years paſt been holden ſufficient, for the plaintiff in the action in the inferior court to alledge in ſuch plea, that a plaint was levied and proceſs prayed in the inferior court; and that *ſuper-inde taliter Proceſſum fuit*, that a *Capias* was awarded; without ſetting out all the proceedings between the levying of the plaint and the awarding of the *Capias*.

In the caſe of *Gwynne* v. *Poole*, *Lutw.* 943. it is laid down, that it is ſufficient to do this; and it was in that caſe holden expreſsly, that it is not neceſſary to ſhew in ſuch plea, that a ſummons iſſued before the awarding of the *Capias*. The authority of the caſe of *Gwynne* v. *Poole*, has been frequently recogniſed; and the authority of the caſe of *Read* v. *Wilmot*, 2 *Vent.* 222. in which it was holden, that it is neceſſary to ſhew in ſuch plea, that a ſummons iſſued before the *Capias* was awarded, has been as frequently denied.

It has been ſaid; that it is not alledged in the plea of *Freeman*, that the cauſe of the action in the inferior court aroſe within the juriſdiction of that court: But it is alledged, that a plaint was levied in the inferior court, for a cauſe of action ariſing within the juriſdiction of that court; this is a ſufficient allegation, that the cauſe of that action did ariſe within the juriſdiction of that court, that

that the fact whether it did ariſe therein might have been traverſed. It is moreover laid down in the caſe of *Gwynne* v. *Poole*, that it is not neceſſary to alledge expreſsly, in a plea ſimilar to that in the preſent caſe, that the cauſe of the action in the inferior court aroſe within the juriſdiction of that court; for that it is ſufficient, if it appear in the plea, that the cauſe of that action did ariſe within the juriſdiction of that court.

Griffith *verſ.* Griffith.

IN an action of debt brought by an adminiſtratrix, it appeared from the declaration; that her letters of adminiſtration were granted by the Biſhop of *Briſtol*.

The right of granting letters of adminiſtration is not founded upon the dying of an inteſtate within a dioceſe, but upon his leaving goods therein.

The defendant pleaded; that the plaintiff's inteſtate died upon the high ſea, out of the juriſdiction of the Biſhop of *Briſtol*; and that the letters of adminiſtration were upon that account void.

Upon a demurrer to this plea, the letters of adminiſtration were, upon great conſideration, holden to be good.

And by *Lee* Ch. J.—The right of granting letters of adminiſtration is not founded upon the dying of an inteſtate within a dioceſe, but upon his leaving goods therein.

There is a great miſtake in the report of the caſe of *Hiliard* v. *Cox*, 1 *Salk.* 37. in which it is ſaid; that a plea ſimilar to that in the preſent caſe was holden to be good; for it appears, from the pleadings in that caſe, 2 *Salk.* 750. that the plea was not that the plaintiff's inteſtate was, at the time of his

death, reſident in another dioceſe: But that the debtor to the plaintiff's inteſtate was, at the time of the inteſtate's death, reſident in another dioceſe.

As there was a debt upon ſimple contract due to the plaintiff's inteſtate at the time of his death, from a perſon who at that time reſided within the dioceſe of *Briſtol*, this, agreeably to what is laid down in the caſe of *Yeomans* v. *Bradſhaw*, *Carth.* 374. gave a right *prima facie* to the Biſhop of *Briſtol* of granting letters of adminiſtration; and we will not intend that the plaintiff's inteſtate left *Bona Notabilia* in any other dioceſe. We will, on the contrary, rather intend, for the ſake of ſupporting the letters of adminiſtration, that the plaintiff's inteſtate did not leave *Bona Notabilia* in any other dioceſe.

Young *verſ.* Lynch.

A prebendary is not entitled to ſhare of the revenues of the church before it is divided, unleſs ſome part thereof be allotted to his prebend in particular.

IN a caſe reſerved, in an action of *Aſſumpſit*, it was ſtated; that the action was for money had and received to the uſe of the plaintiff; that upon the 24th day of *June*, 1746, a prebend of *Canterbury* was granted by the king to the plaintiff; that upon the ſame day the dean and chapter were commanded to aſſign the plaintiff a ſtall in that cathedral; that upon the 27th day of the ſame month the plaintiff was admitted a prebendary; that upon the 28th day of the ſame month he was inſtalled; that upon the 24th, 25th, 26th and 27th days of the ſame month a chapter was holden, and fines were ſet and paid, upon the renewal of leaſes, to the amount of two thouſand nine hundred and eighty-nine pounds, three ſhillings and ſix-pence; that by the ſtatutes

ſtatutes of the church, the money received for fines, upon the renewal of leaſes, is to be divided into ſhares; of which two are to be paid to the dean and one to each prebendary; that the money received for the fines paid, upon the days before mentioned, was divided into thirteen ſhares; that the defendant, who was dean, received two ſhares, which amounted to four hundred and fifty-nine pounds, ſeventeen ſhillings and five-pence halfpenny; that if this money had been divided into fourteen ſhares, and one of them had been paid to the plaintiff, two ſhares would have amounted to no more than four hundred and twenty-ſeven pounds, two ſhillings and ſix-pence: And conſequently, the dean would have received thirty-two pounds, ſixteen ſhillings and eleven-pence halfpenny leſs than he did receive; that there are very few inſtances of a prebendary's having received a ſhare of the fines paid upon the renewal of leaſes, which were ſet at a chapter holden prior to his inſtallation; and that in every one of theſe inſtances, it is expreſſed in the act of the chapter, that the ſhare was paid to the prebendary by the benevolence of the Dean and Chapter.

One queſtion was, whether the plaintiff had a right to a ſhare of the money paid for fines upon the 24th, 25th, 26th and 27th days of *June*?

It was holden, upon great conſideration, that he had not.

And by *Lee* Ch. J.—The claim of the plaintiff is founded upon the 28 *H.* 8. *c.* 11. *par.* 4. by which it is provided, that the revenue and profits of a prebend, growing due during a vacancy of the prebend, ſhall be paid to the next perſon who ſhall be lawfully admitted to

to the prebend. Under this ſtatute, the perſon admitted to a prebend is entitled to ſuch part of the revenue of the church, growing due during the vacancy of the prebend, as is allotted to that prebend in particular: But no part of the revenue of the church of *Canterbury* is allotted to any prebend in particular, except the annual ſtipend of ſeventeen pounds, ſix ſhillings and eight-pence, which, by the 16th chapter of the ſtatutes, is to be paid to every prebendary *pro corpore præbendæ ſuæ*. The reſidue of the revenue is the joint property of the dean and chapter, as being an aggregate body; and no member of this body has any right to any part thereof, before it is divided into ſhares. In the caſe of *Philips* v. *Bury*, *Skin.* 488. it is laid down; that the head of a college cannot maintain an aſſize for any part of the revenue of the college, until his part thereof is aſcertained by a diviſion of the revenue.

No poſitive opinion was given in the caſe of *Moſely* v. *Warburton*, Lord *Raym.* 265. But *Holt* Ch. J. expreſſed himſelf to the following purport; If a prebendary be a ſole body, the Biſhop, upon a *levari facias de bonis eccleſiaſticis*, may ſequeſter his prebend: But if a prebendary be a member of an aggregate body, compoſed of a dean and chapter, the biſhop ought to return *nulla bona eccleſiaſtica*: Becauſe ſuch prebendary is not entitled to any part of the revenue of the church, before a diviſion is made thereof.

Another queſtion was, Whether, if the plaintiff had a right to a ſhare of the money paid for fines upon the 24th, 25th, 26th and 27th days of *June*, he ought to recover the ſum of thirty-two pounds, ſixteen ſhillings and eleven-pence halfpenny in the preſent action?

As

As the opinion of the court was againſt the plaintiff upon the other queſtion, no opinion was given upon this.

Griffith *verſ.* Williams.

A defendant cannot wave his plea upon the laſt continuance day, without leave of the court.

UPON a rule to ſhew cauſe, why a verdict upon an iſſue joined on a plea of *not guilty*, and an aſſeſſment of damages, upon a judgment on a *demurrer*, by the jury who tried iſſue, ſhould not be ſet aſide, it appeared; that after the notice of trial had been given, the defendant's attorney, upon the laſt continuance day, entered a *relicta verificatione* as to the plea of not guilty, and gave notice thereof to the plaintiff's attorney.

The queſtion was, Whether the plaintiff could proceed to the trial of the iſſue, after notice that a *relicta verificatione* was entered as to the plea of not guilty.

It was holden that he might.

And by the court—The defendant could not wave his plea of not guilty upon the laſt continuance day, without leave of the court, and conſequently the plaintiff was not obliged to regard the notice of waver thereof. The caſe, which has been cited, goes no further than to ſhew, that a defendant may, without leave of the court, wave his plea before the adjournment day.

Stonehouſe

Stonehouſe *verſ.* Vowell.

A defendant cannot demur unleſs for good cauſe, after an undertaking to plead iſſuably.

UPON a rule to ſhew cauſe, why the judgment ſhould not be ſet aſide for irregularity, it appeared; that after the defendant had obtained an order from a judge for time to plead, upon an undertaking to plead an iſſuable plea, and take ſhort notice of trial, he demurred generally.

The rule was diſcharged.

And by the court—A demurrer for good cauſe would certainly have been an iſſuable plea within the meaning of the defendant's undertaking: But as the demurrer is a general one; and as there does not appear to be any good cauſe for demurring, the court ought to intend, that it was a trick to poſtpone the trial of the cauſe.

Rex *verſ.* The Inhabitants of Eakring.

An apprenticeſhip is determined by the death of either maſter or apprentice

IN an order of ſeſſions it was ſtated; that the *Pauper* was bound an apprentice, by pariſh indentures, in the pariſh of *Eakring*, until he ſhould attain the age of twenty-one; that he ran away from his maſter, and never returned to him; that his maſter died in *June* 1749; that at *Michaelmas* 1749 he let himſelf as a ſervant for a year in the pariſh of *Selſon*, and ſerved the year; that at *Martinmas* 1750 he let himſelf to the ſame maſter for another year and ſerved it; that he received the wages for both years ſervice himſelf, no notice being taken of him by the executors of his maſter; and that in *January* 1750, he attained the age of twenty-one years.

The

The queſtion was, Whether the *Pauper* gained a ſettlement in *Selſon?*

It was holden that he did,

And by the court—It has been ſaid; that the apprenticeſhip continued, notwithſtanding the death of the maſter: But we are of opinion, that it did not. In the caſe of *Rex* v. *Peck*, *Salk* 66. it is ſaid by *Eyre* J. who was afterwards chief juſtice of the court of common pleas, that an action of covenant lies upon an indenture of apprenticeſhip againſt an executor; becauſe no inconvenience follows therefrom, in as much as the executor may defend himſelf by pleading no aſſets: But that the apprenticeſhip, it being a perſonal truſt between the maſter and apprentice, is determined by the death of either; becauſe the end and deſign thereof can no longer be obtained.

Trinity Term,

27 Geo. 2. 1753.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Rex *verſ.* Furſer.

A new trial granted after an acquittal upon an indictment.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an indictment, it appeared; that the indictment had been removed by the defendant; that his clerk in court had entered notice of trial in the office book; and that the defendant had been acquitted.

The rule was made abſolute.

And by the court—It has been ſaid; that as the defendant was obliged, by the recognizance entered into upon removing the indictment, to try the iſſue that ſhould be thereupon joined at the next aſſizes, it was not neceſſary

neceſſary to give any notice of trial: But it is by the 5 *W.* & *M. c.* 11. provided, that notice of trial ſhall in ſuch caſe be given by the defendant.

It has been ſaid; that if any notice of trial were neceſſary, the entering of notice in the office book was ſufficient notice: But it is by the ſame ſtatute provided, that notice of trial ſhall, in ſuch caſe, be given by the defendant to the proſecutor or his clerk in court.

Hampſon *verſ.* Adſhead.

Full coſts are not to be paid for a conſequential injury to a perſonal chattel, if the damages are under forty ſhillings, and there is not a certificate.

UPON a motion for the maſter to review his taxation of coſts in an action of *treſpaſs*, it appeared; that the plaintiff had declared in one court, that the defendant aſſaulted and beat him, and threw him down upon the ground, which was covered with water, and *thereby* damaged his cloaths; that there was a general verdict for the plaintiff, with damages under forty ſhillings: And that the judge, before whom the cauſe was tried, had not certified that the battery was ſufficiently proved.

The queſtion was, Whether the plaintiff ought to recover any more coſts than damages?

It was holden that he ought not.

And by *Lee* Ch. J.—The damaging of the cloaths is charged in this declaration, as a conſequence of the aſſault and battery, and cannot be ſo ſeparated therefrom, as to make it an independent injury to a perſonal chattel. And by *Deniſon* J. the word *thereby* means the ſame as the words *per quod*, and it has been

frequently holden, that a plaintiff in an action of *treſpaſs* is not entitled to full coſts for an injury to a perſonal chattel laid with a *per quod*, unleſs damages are found to the amount of forty ſhillings, or there be a certificate. If it had been alledged that the defendant threw water upon the plaintiff's cloaths, and that the cloaths were thereby damaged, the plaintiff would have been entitled to full coſts; becauſe the throwing of the water upon the cloaths would, in that caſe, have been an independent injury to a perſonal chattel.

Rex *verſ.* The Inhabitants of Steyning.

A pariſh is not obliged to repair highway, which is not much wanted for the uſe of the publick.

UPON a motion for an information againſt the defendant, for not repairing a highway in the pariſh of *Steyning*, it appeared; that the highway was out of repair; that the pariſh had always repaired it; and that two bills of indictment for not repairing it, which had been preferred to two grand juries, had been found no true bills: But it likewiſe appeared; that the highway was only about one hundred yards in length; and that another highway in the town of *Steyning*, near this, and ſo little a way about as to be almoſt equally convenient to the publick, was in good repair.

Wright J. was of opinion, that a rule to ſhew cauſe ought to be made; for that all highways ought to be kept in repair.

The other three juſtices being of a contrary opinion, no rule was made.

And by them—The court ought never to give leave to file an information, for not repairing a highway, unleſs it appear; that it is of conſequence to the publick that the high-

way

way ſhould be repaired; and that the grand jury have been guilty of very groſs miſbehaviour in not finding a bill of indictment a true bill. No miſbehaviour of either of the grand juries is charged in the preſent caſe; and it would be a great hardſhip to compel the pariſh to repair this highway, when it appears, that another highway, almoſt equally convenient to the publick, is in good repair. There are in many pariſhes ways which may be well deemed highways, and yet are ſuffered to be out of repair; becauſe the repairing of them would be of very little conſequence to the publick, and it would be an immenſe expence to the pariſhes. There is another reaſon, why the court ought never to give leave to file an information for not repairing a highway, unleſs it be a caſe of great enormity; namely, that the fine ſet, on a conviction upon an information for not repairing a highway, cannot be expended in repairing the highway; whereas the fine ſet, on a conviction upon an indictment for not repairing a highway, is always to be expended in the repair of the highway.

Newland and others *verſ.* Oſomond.

The putative father of a baſtard child may maintain it himſelf.

IN an action of debt upon a bond, the condition of the bond appeared to be; that the defendant ſhould indemnify the churchwardens and overſeers of a pariſh, and their ſucceſſors, from all expence on account of the birth, maintenance and education of a baſtard child.

The defendant pleaded; that, from the time of the birth of the child to the time of its being put out to nurſe by the plaintiffs, who

who were the churchwardens and overſeers of the pariſh, he had maintained it; that at the time of putting the child out to nurſe he offered to maintain it, and has been ever ſince, and ſtill is, ready to maintain it; but that the plaintiffs at that time refuſed, and ſtill do refuſe, to permit him ſo to do; that the plaintiffs of their own wrong put the child out to nurſe; and that if they are damaged, the damage was occaſioned by their own wrong.

The plaintiffs replied; that for the ſpace of three weeks after putting the child out to nurſe the defendant did not maintain it; but they were obliged to maintain it, whereby they are damnified.

Upon a demurrer to this replication, *Lee* Ch. J. *Wright*, J. and *Deniſon* J. were of opinion, that the putative father of a baſtard child has a right to maintain it himſelf.

And by them—It is by the 18 *Eliz. c.* 3. provided, that an order may be made for the relief of a pariſh, in caſe a baſtard child has been left to be a charge upon it, and for the further maintenance of a child ſo left: But it does by no means follow, that the putative father may not maintain it himſelf. It ought rather to be inferred that he may; for, by ſo doing, the miſchief intended to be remedied, namely, the child's being left to be a charge upon the pariſh, would be prevented. In *Sherman*'s caſe, 1 *Vent.* 210. it is ſaid by *Twiſden* J. that an order for the putative father of a baſtard child to allow a certain ſum *per* week for the maintenance of the child, until it ſhall be able to get its living by working, is bad; for, perhaps, the father would take it away and maintain it himſelf, which he may do if he pleaſe. It is not proper, that a pariſh ſhould in all caſes have the care of a baſtard child

child born therein; for the father, who may be a man of fortune, would, perhaps, take much better care of it.

Foſter J. doubted, as to the right of the putative father of a baſtard child to maintain it himſelf, and added, that in his opinion, there would be danger of baſtard childrens dying for want of care, or of their being murdered, if all the putative fathers of ſuch children could take them from the officers of the pariſhes wherein they are born, and carry them where they pleaſe.

The caſe was ordered to ſtand for conſideration.

At another day judgment was given for the defendant; the opinion of the court being; that the plea, which contains a ſufficient excuſe for non-performance of the condition of the bond, is good; and that the replication is bad, becauſe it does neither confeſs, nor avoid, the matter pleaded in excuſe.

Daviſon *verſ.* Daviſon.

A payment of coſts to the acting attorney is good, although he act in the name of another attorney.

UPON a rule to ſhew cauſe, why an attachment ſhould not be awarded for non-payment of coſts, it appeared; that the demand of the coſts was made by the perſon known to be the acting attorney in the cauſe; that this perſon not being an attorney of this court, the name of another perſon, who is an attorney of this court, and in whoſe name the cauſe was commenced and carried on, is upon the record; and that the acting attorney had not a letter of attorney from the attorney upon the record, empowering him to receive the coſts.

The

The rule was made abſolute.

And by the court—As the perſon, by whom the coſts were demanded, was known to be the acting attorney in the cauſe, payment to him would have been a good payment, although he be not the attorney upon record; for it is by the 2 *G.* 2 *c.* 23. *par.* 10. provided; that an attorney of any of the ſuperior courts may commence and carry on, or defend, an action in any other of the ſuperior courts, in the name of an attorney of the court in which the action is commenced.

Rex *verſ.* Newland.

Several matters cannot be pleaded in an information in the nature of a *quo warranto.*

UPON a rule to ſhew cauſe, why the defendant ſhould not have leave to plead ſeveral matters in an information in the nature of a *quo warranto*, the queſtion was, Whether the 4 *Ann. c.* 16. do extend to ſuch an information?

It was holden that it does not.

And by the court—There is no inſtance of the courts having given leave to plead ſeveral matters in an information in the nature of a *quo warranto.*

Callaghan *verſ.* Pennell.

Non aſſumpſit infra ſex annos is a ſpecial plea.

UPON a rule to ſhew cauſe, why the judgment ſhould not be ſet aſide for irregularity, it appeared; that the action was an action of *aſſumpſit*; that *non aſſumpſit infra ſex annos* was pleaded; and that the iſſue was not made up by the clerk of the papers.

The

The rule was made abſolute.

And by the court—In the caſe of *Howell* v. *Clark*, *Hil.* 13 G. 2. in this court, and in the caſe of the *Bank of England* v. *Wait*, *Trin.* 16 G. 2. likewiſe in this court, it was holden; that *non aſſumpſit infra ſex annos* is a ſpecial plea, and no caſe has been cited, wherein the contrary has been holden. Wherever a ſpecial plea is pleaded, the iſſue, by the ſettled practice of this court, muſt be made up by the clerk of the papers.

Niſbett *verſ.* Griffith.

A declaration cannot be amended by adding a new count after two terms.

UPON a rule to ſhew cauſe, why the plaintiff ſhould not have leave to amend his declaration, it appeared; that the amendment intended was to add a new count after two terms.

The rule was diſcharged.

And by the court—It has been ſaid; that in the caſe of *The Executors of the Dutcheſs of Marlborough* v. *Widmore*, *Trin.* 4 G. 2. in this court, leave was given to amend by adding a new count after two terms: But no other caſe has been cited, wherein ſuch an amendment has been permitted, and it was in that caſe permitted upon very particular circumſtances; namely, that the defendant had pleaded the ſtatute of limitations; and that, if the court did not give leave to amend, the right of action would be loſt, the plaintiffs not being in time to bring a new action.

Rex *verſ.* Smith.

It is not neceſſary to ſet out the length and breadth of a nuſance in an indictment.

UPON a rule to ſhew cauſe, why judgment ſhould not be arreſted, it appeared; that the defendant had been found guilty upon an indictment for a nuſance, in laying ſoil in a highway, between a place called *A.* and a houſe called *B.* in the pariſh of *St. Mary Ottery.*

The queſtion was, Whether the indictment is bad for want of the length and breadth of the nuſance being ſet out?

After taking time to conſider, it was holden that the indictment is not bad.

And by *Lee* Ch. J.—It has been ſaid; that although neither the length nor breadth of the nuſance is traverſable, both ought to be ſet out in an indictment for a nuſance, in order to guide the diſcretion of the court in ſetting a fine: But it is not neceſſary on that account; regard not being had by the court, in ſetting a fine, to the length and breadth of the nuſance ſet out, but to the length and breadth proved. Of both theſe the judge, before whom the indictment was tried, muſt always be ſufficiently informed for giving judgment, and if judgment is not to be given by him, but by another court, that court will always be ſufficiently informed of both by his report.

Hewitt

Hewitt *verſ.* Penny.

UPON a rule to ſhew cauſe, why an award ſhould not be ſet aſide, it appeared; that the arbitrators, inſtead of chooſing an umpire, which in caſe of their not agreeing they were empowered to do, had toſſed up who ſhould name one; and that the award was made by the perſon named in conſequence of the toſſing up.

An award ſet aſide, becauſe the Umpire was named in conſequence of toſſing up.

The rule was made abſolute.

And by the court——In the caſe of *Harris* v. *Mitchell*, 2 *Vern.* 486. an award made by an Umpire was ſet aſide; becauſe the two arbitrators had thrown up croſs or pyle who ſhould name the Umpire.

Kennedy *verſ.* Kennedy.

UPON a rule to ſhew cauſe, why the trial ſhould not be put off, it appeared; that the action was brought by an adminiſtrator; and that a ſuit was depending in a ſpiritual court for revoking his letters of adminiſtration.

Letters of adminiſtration may be acted under until they are revoked

The rule was diſcharged.

And by the court——The plaintiff has a right to act under the letters of adminiſtration, until they are revoked. There is no neceſſity to put off the trial in this caſe; for if the plaintiff ſhould proceed to execution, and the letters of adminiſtration ſhould be

afterwards revoked, an *audita Querela* would, agreeably to what is laid down in the caſe of *Turner* v. *Davies*, 2 *Saund.* 150. lie for the defendant.

Lawrence *verſ.* Boſwell.

A verdict for the finding of which the jurors voted ought not to be ſet aſide.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had, it appeared; that the jurors, not agreeing as to the finding of a verdict, voted for one; that the votes of ſeven of them were for finding it as it is found; and that no objection was made by the other five when the verdict was given.

The rule was diſcharged.

And by the court—Nothing was in this caſe determined by chance. The five jurors might ultimately be convinced by the ſeven: But if they only acquieſced in the finding of the verdict, that is ſufficient; and they ſhall not now be received to ſay, that they did not acquieſce.

Rex *verſ.* The Inhabitants of Tardebigg.

Marriage during a ſervice does not prevent the gaining of a ſettlement.

IN an order of ſeſſions it was ſtated; that the *Pauper* was hired as a ſervant, from *Michaelmas* day in one year to *Michaelmas* day in the next year, in the pariſh of *Tardebigg*; that he came three days after the former *Michaelmas*, and ſtayed one day after the latter; that he was abſent, during the year, at different times about fourteen days, for which ſix ſhillings were deducted out of his wages; that he was afterwards hired for a year in *Hanbury*; that after ſerving three quarters of this year he married a woman who was

was with child; that complaint was made of this by his maſter to a juſtice of peace, who made no order for the diſcharge of the *Pauper*; and that ſoon after the *Pauper* was diſcharged by his maſter, and a deduction was made out of his wages for the remainder of the year; that the diſcharge and deduction were againſt the conſent of the *Pauper*; and that he offered to ſerve the remainder of the year.

One queſtion was, Whether the *Pauper* gained a ſettlement in *Tardebigge*?

It was holden that he did.

And by the court——The abſences of the *Pauper* in the beginning of the year, and during the ſervice, were cured by the maſter's receiving him again; and the deduction of wages did not prevent his gaining a ſettlement.

Another queſtion was, Whether the *Pauper* gained a ſubſequent ſettlement in *Hanbury*?

It was holden that he did.

And by the court—Marriage is not in itſelf a diſſolution of a contract for ſervice. It has been holden, that marriage is not a good cauſe for diſcharging an apprentice: For that the remedy is by an action upon the covenant. It is very doubtful, whether, as the power given to a juſtice of the peace by the 5 *Eliz. c.* 4, *par.* 5. of diſcharging a ſervant, is only given for reaſonable cauſe, marriage is a reaſonable cauſe of diſcharge: But if it be, as the juſtice of the peace made no order for the diſcharge of the *Pauper*, the diſcharge by his maſter was illegal. The offer of the *Pauper* to ſerve the remainder of the year ought to be deemed

deemed a continuation of the ſervice; and if the ſervice continued, the deduction of wages, eſpecially as it was againſt the conſent of the *Pauper*, did not prevent his gaining a ſettlement.

Rex *verſ.* Blunt.

A new trial cannot be had after an acquittal upon an information in the nature of a *Quo Warranto.*

UPON a motion for a new trial, it appeared; that the defendant had been acquitted upon an information in the nature of a *Quo Warranto.*

The court refuſed to make a rule to ſhew cauſe.

And by the court—In the caſe of *Rex* v. *Bennett*, *Trin.* 4 *G.* 1. which was argued before all the judges, a new trial was not granted after an acquittal upon ſuch an information; the judges being equally divided in opinion upon the queſtion, whether a new trial can be granted after an acquittal upon an information in the nature of a *Quo Warranto?* In the caſe of *Rex* v. *Jones*, *Trin.* 12 *G.* 1. wherein the ſame queſtion aroſe; a new trial was not granted, the court being equally divided in opinion upon the queſtion.

Anonymous.

The firſt weekly payment to a priſoner has a retroſpect to the day of notice

UPON a motion, for diſcharging the defendant out of priſon, it appeared; that notice had been given to the defendant, upon the 31ſt day of *March*, that the plaintiff would pay him two ſhillings and four pence *per* week; that upon the 4th day of *April*, two

two ſhillings and four pence were paid to him, and upon the 14th day of *April* two ſhillings and four pence.

A rule was made for diſcharging the defendant.

And by the court—The firſt weekly payment to a priſoner has always a retroſpect to the day of notice; and as the weekly payments to a priſoner are to be made upon the firſt day of every week, the priſoner muſt be diſcharged; becauſe the ſecond weekly payment was not upon the ſeventh day of *April*.

Rex *verſ.* Swimmer.

Binding a poor child to ſerve as an apprentice in foreign parts is unlawful.

UPON a rule to ſhew cauſe, why an information ſhould not be filed againſt the defendant, it appeared; that the defendant was a pariſh officer; and that he had bound three poor children to ſerve as apprentices in foreign parts, and had ſent them thither.

The court ſhewed an inclination to make the rule abſolute; the offence being deemed kidnapping: But upon an undertaking of the defendant, to have the children back by a certain time, it was diſcharged.

Jennings qui tam *verſ.* Wilſon and two others.

Judgment as in the caſe of a *nonſuit*, ought not to be given, unleſs all the defendants apply for it.

UPON a rule to ſhew cauſe, why there ſhould not be judgment as in the caſe of a *Nonſuit*, it appeared; that one of the defendants had not appeared; and that the two who had appeared and pleaded both joined in the application.

The rule was diſcharged.

And

And by the court—It has been ſaid; that this caſe differs from the caſe of (D) *Watſon qui tam* v. *Jackſon and others*, *Hil.* 25 *G.* 2. in as much as one of the defendants, who had appeared and pleaded, did not in that caſe join in the application: But there is no reaſon for the court to depart, on account of this difference, from what was then holden; for the ground of the opinion of the court in that caſe was, that unleſs all the defendants in an action apply for judgment as in the caſe of a *Nonſuit*, the court ought not to give ſuch judgment. It has been ſaid; that if judgment as in the caſe of a *Nonſuit* cannot be obtained, becauſe one of the defendants in an action has not appeared, a vexatious plaintiff may always make ſome friend a defendant, upon whom he can prevail not to appear, in order to prevent the obtaining of ſuch judgment by the defendants who have appeared: But this argument does not hold ſtronger in the preſent caſe, than it would have done in the caſe of *Watſon qui tam* v. *Jackſon and others*; it being juſt as eaſy, for a vexatious plaintiff to make ſome friend a defendant, upon whom, if he do appear, he can prevail not to apply for judgment as in the caſe of a *Nonſuit*, as it is to make ſome friend a defendant, upon whom he can prevail not to appear.

(D) Ante page 22.

Michaelmas

Michaelmas Term,

27 Geo. 2. 1753.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter,
} *Juſtices.*

Rex *verſ.* The Corporation of Scarborough.

A ſecond *Mandamus* for electing corporation officers ought not to be awarded, upon a preſumption that the firſt will be ſuppreſſed.

UPON a motion for a *Mandamus* to the corporation of *Scarborough*, for proceeding to the election of certain officers, it appeared; that ſuch a *Mandamus*, as was now moved for, had been awarded two days before upon the application of another perſon.

The court refuſed to award a ſecond *Mandamus*.

And by the court—It has been ſuggeſted as a ground for the preſent motion; that the perſon who applied for the former *Mandamus* will ſuppreſs it: But as it is not to be preſumed, that any perſon will dare to ſuppreſs a writ of this court, it is improper to award a ſecond *Mandamus*.

Rex *verſ.* The Corporation of Haſlemere,

If there be delay in obeying a *Mandamus* for electing corporation officers, a ſecond *Mandamus* ought to be awarded.

UPON a motion for a *Mandamus* to the corporation of *Haſlemere*, for proceeding to the election of certain officers, it appeared; that ſuch a *Mandamus*, as was now moved for, had been already awarded upon the application of another perſon.

The court refuſed to award a ſecond *Mandamus:* But a time for proceeding to the election was ordered to be inſerted in the former *Mandamus*.

A rule was likewiſe made, whereby it was ordered; that the notice of the election ſhould be given by the under-ſheriff.

At another day, it appearing, that the time for proceeding to the election was paſſed, and that no notice of the election had been given by the under-ſheriff, a ſecond *Mandamus* was awarded.

And by the court—If it had appeared upon the motion for a ſecond *Mandamus;* that there was good ground to ſuſpect delay in proceeding under the firſt, the court would then have awarded a ſecond. It does now appear, that there has been delay in proceeding under the firſt, and conſequently it is now proper, that a ſecond *Mandamus* ſhould be awarded.

Methuen

Methuen *verſ.* Martin.

UPON a rule to ſhew cauſe, why a ſum of money paid by the defendant, ſhould not be repaid with coſts, it appeared; that the defendant was a private man in one of the troops of life guards; and that, being arreſted for a debt under ten pounds, he paid the debt in order to obtain his liberty.

A private man in one of the troops of life guards is not liable to be arreſted for a debt under ten pounds.

One queſtion was, Whether the defendant be ſuch a ſoldier, as is by 26 *G.* 2. *c.* 5. exempted from being liable to an arreſt for a debt under ten pounds?

Wright J. *Deniſon* J. (*Lee* Ch. J. being abſent) were of opinion that he is.

And by *Wright* J. it is declared by that ſtatute, "that no perſon, who ſhall be liſted, or "ſhall liſt himſelf as a volunteer in his Majeſ-"ty's ſervice as a ſoldier, ſhall be liable to "be taken out of his Majeſty's ſervice by any "proceſs, other than for ſome criminal matter, "unleſs for a real debt of ten pounds."

Foſter J. inclined to be of opinion, that as a perſon, inſtead of receiving money, pays a conſiderable ſum upon being admitted as a private man into a troop of life guards, ſuch perſon is not a ſoldier within the meaning of that ſtatute.

At another day, a certificate being produced from the commiſſary general's office, that the defendant did liſt himſelf as a volunteer; and it appearing, that ſoon after he liſted himſelf, the articles of war were read over to him; and that the oath directed to be adminiſtered

niſtered to a ſoldier by a juſtice of the peace was taken by him, *Foſter* J. concurred in opinion with the other juſtices.

Another queſtion was, Whether, although the defendant would, while under the arreſt, have been entitled to the diſcharge of his perſon, he be now entitled to have the money paid to obtain his liberty repaid?

It was holden that he is.

And by the court——It is equally reaſonable, that the money paid by the defendant to obtain his liberty ſhould be repaid, as that his perſon, in caſe the application had been on that account, ſhould have been diſcharged.

Rex *verſ.* Boys.

An indictment lies for not paying the coſts ordered to be paid upon diſcharging an appeal to a Poor's rate.

UPON a rule to ſhew cauſe, why an indictment ſhould not be quaſhed, it appeared; that the indictment was for diſobedience to an order of ſeſſions, whereby coſts were ordered to be paid by the defendant upon the diſmiſſion of an appeal to a Poor's rate.

The rule was diſcharged.

And by the court—It is in the general true, that diſobedience to an order of ſeſſions is an indictable offence.

It has been ſaid; that as the juſtices of a court of quarter ſeſſions are only empowered by the 17 *G.* 2. *c.* 38. to order coſts to be paid upon an appeal to a Poor's rate, in the ſame manner as they are by the 8 & 9 *W.* 3. *c.* 30. empowered to do upon an appeal to an order of removal, an indictment does not lie, for not

not paying the coſts ordered to be paid upon an appeal to a Poor's rate; another remedy by diſtreſs being given by the 8 & 9 *W.* 3. for the coſts ordered to be paid upon an appeal to an order of removal: But this objection is not well founded; for the remedy by diſtreſs is only given, where the perſon ordered to pay the coſts lives out of the juriſdiction of the court.

Archer *verſ.* Ellard.

An affidavit that money is due upon the penalty of a bond, is not ſufficient for holding to ſpecial bail.

UPON a rule to ſhew cauſe, why the defendant ſhould not be diſcharged on filing common bail, it appeared; that the affidavit for holding to ſpecial bail was, that the defendant is indebted to the plaintiff upon a bond in the penalty of one hundred pounds; and that the bond was a bond for performance of covenants.

The rule was made abſolute.

And by the court—This affidavit is inſufficient, for want of ſhewing ſome particular breach or breaches of covenant, on account of which the ſum of ten pounds is due to the plaintiff. In the caſe of *Booker* v. *Friend*, *Trin.* 24 & 25 *G.* 2. in this court, an affidavit, that the defendant was indebted to the plaintiff in the ſum of twenty pounds, upon breach of articles, was holden to be inſufficient for holding to ſpecial bail; becauſe no particular breach of the articles was ſhewn. If an action be brought upon a bond for the payment of money, it is not enough, that the affidavit for holding to ſpecial bail ſhew the penalty of the bond: But it muſt likewiſe ſhew,

ſhew, that the ſum of ten pounds is due upon the bond for principal and intereſt.

Wigan *verſ.* Holmes.

Judgment, as in the caſe of a *Nonſuit*, may be given where the return to a *Mandamus* is traverſed.

UPON a motion for judgment as in the caſe of a *Nonſuit*, it appeared; that a material fact contained in a return to a *Mandamus* was traverſed; and that iſſue was joined upon the traverſe.

Wright J. (*Lee* Ch. J. being abſent) at firſt had ſome doubt, whether the ſtatute, by which the court is empowered to give judgment, as in the caſe of a *Nonſuit* "in any action between party and party," does extend to a traverſe of a return to a *Mandamus?*

But it was obſerved by *Deniſon* J. that it is by the 9 *Ann. c.* 20. declared; that if any material fact contained in a return to a *mandamus* ſhall be traverſed, ſuch further proceedings ſhall be had thereupon, as if an action had been brought for a falſe return.

A rule was made to ſhew cauſe, which no cauſe being ſhewn, was afterwards made abſolute.

Rex *verſ.* Harriſon.

If the facts, upon which a rule to ſhew cauſe is made, are expreſsly denied, the practice is to diſcharge the rule.

UPON a rule to ſhew cauſe, why an attachment ſhould not be awarded, it appeared; that every fact, charged in the affidavit upon which the rule was made, was particularly and expreſsly denied in the affidavit upon which cauſe was ſhewn.

The rule was diſcharged.

And

And by the court—If all the facts, charged in the affidavit upon which a rule to ſhew cauſe is made, are poſitively and ſo expreſsly denied in the affidavit upon which cauſe is ſhewn, that if the denial be falſe, an indictment will lie for perjury, it is the courſe of the court to diſcharge the rule, and leave the party, upon whoſe application it was obtained, to proſecute for perjury.

Anonymous.

UPON a motion that the defendant might be diſcharged out of priſon, it appeared; that an action *qui tàm* had been brought againſt the defendant for the penalty of one hundred pounds, given by the 6 & 7 *W.* 3. *c.* 6. for having married two perſons without a licence, or without the publication of bans; that he had been committed for want of appearing, and had lain in priſon four months; and that there had been no further proceeding in the action.

A *Superſedeas* awarded, becauſe there had been no proceeding againſt a defendant in priſon within four months.

A rule was made, that, upon an appearance being entered for the defendant, a *Superſedeas* ſhould be awarded.

And by the court—As there has been no proceeding againſt the defendant within four months, he is, upon an appearance being entered, entitled to a *Superſedeas*.

Rex

Rex *verſ.* Lediard.

An information for a libel, on account of what was contained in an affidavit, refuſed.

UPON a motion, for leave to file an information for a libel, it appeared; that, after a perſon had been committed to priſon under the warrant of a juſtice of the peace, the defendant, another juſtice of the peace, granted a warrant of *Superſedeas;* and that complaint being made of this to the Lord Chancellor, the defendant exhibited an affidavit in excuſe of himſelf. The ground of the preſent motion was; that divers matters contained in this affidavit were impertinent, and amounted to a libel upon the juſtice by whom the perſon was committed.

The court refuſed to make a rule to ſhew cauſe.

And by the court—There is no inſtance of this court giving leave to file an information in a caſe like the preſent. It is not uſual for any court to examine minutely all the matters contained in ſuch an affidavit: But if it were proper to do this, and to give redreſs in the preſent caſe, the application for it ought to be to the court wherein the affidavit was exhibited, and not to this court.

Hilary

Hilary Term,

27 Geo. 2. 1754.

Sir William Lee, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Schomberg *verſ.* Naſh.

If a coachmaker has agreed to keep a carriage in repair, he is bound to take notice when it wants repair.

IN an action of debt, the plaintiff declared upon an agreement entered into by the defendant, a coachmaker; by which he was, on the penalty of one hundred pounds, to find a chariot for the plaintiff, and keep it in repair for the term of five years; and the breach aſſigned was, that the chariot found by the defendant did, during the term of five years, break down for want of being kept in repair.

The defendant pleaded; that he did at all times, ſince the agreement was entered into, repair the chariot when notice was given to him that it wanted repair; and that he is

ready to repair it during the reſidue of the term of five years, whenever notice ſhall be given to him that it wants repair.

Upon a demurrer to this plea, the queſtion was, Whether it was incumbent upon the plaintiff, when the chariot wanted repair, to give notice thereof to the defendant?

It was holden that it was not.

And by the court—The defendant, being coachmaker, was a much better judge when the chariot wanted repair than the plaintiff: But if this were not ſo; as the defendant was bound by the agreement to keep the chariot in repair, it was his duty to take notice, from time to time, what repair it wanted, and to take care that it was in repair.

Rex *verſ.* Kendrick.

If contemptuous words are ſpoken of the court, an attachment is to be awarded in the firſt inſtance.

UPON a motion for an attachment, it appeared; that the defendant, upon being ſerved with proceſs, had ſpoken contemptuous words of the court.

An attachment was awarded.

And by the court—The diſtinction is, that where contemptuous words are ſpoken of the court, an attachment is to be awarded in the firſt inſtance: But where the words are ſpoken of the proceſs of the court, there is to be a rule to ſhew cauſe.

Hawkins

Hawkins *verſ.* Eaſterbrooke.

IN a caſe reſerved, in an action of debt upon a bond, it was ſtated; that the penalty of the bond was twenty pounds; that the condition of the bond was, that *John Eaſterbrooke*, ſon of the defendant, ſhould ſerve the plaintiff as an apprentice four years, and not abſent himſelf during that term from the ſervice of the plaintiff, without leave; that the plaintiff alledged in his declaration, that *John Eaſterbrooke* did on a certain day during the term, abſent himſelf from the ſervice of the plaintiff without leave, and continued abſent to the end of the term; that the defendant pleaded, that *John Eaſterbrooke* did not abſent himſelf from the ſervice of the plaintiff; that iſſue was joined upon this plea, that at the trial of the iſſue it was proved, that *John Eaſterbrooke* did abſent himſelf from the ſervice of the plaintiff during the term, and that another perſon was hired, during his abſence, to do the buſineſs which he ought to have done; and that it was likewiſe proved, that *John Eaſterbrooke*, after having been ſome time abſent, returned to the plaintiff, and was received and employed by him.

An action lies upon a covenant, that an apprentice ſhall not abſent himſelf from his maſter's ſervice, although his maſter receive him after having abſented himſelf

The queſtion was, Whether the action could be maintained?

It was holden that it might.

And by *Wright* J, (*Lee* Ch. J, being abſent) it has been ſaid, and very truly; that the receiving of a ſervant, after having abſented himſelf, does ſo far purge the abſence, that it ſhall not prevent his gaining a ſettlement; and, perhaps, the abſence in the preſent caſe

was ſo far purged by the ſubſequent reception of the apprentice, that it would not have been a cauſe of diſcharging him: But if this were ſo, it would by no means follow, that the preſent action does not lie.

And by *Deniſon* J. If an action of covenant be brought, upon a covenant that an apprentice ſhall not abſent himſelf from his maſter's ſervice, the receiving of the apprentice after having abſented himſelf ought to go in mitigation of damages: But if a penalty be agreed upon, in caſe an apprentice ſhall abſent himſelf from his maſter's ſervice, an action of debt lies for the penalty upon any abſence. It was not neceſſary for the plaintiff to alledge a continuance of the abſence; in as much as, his right to recover the penalty was not waved by the reception and employing of the apprentice, after he abſented himſelf.

And by *Foſter* J. the ſingle queſtion is, Whether *John Eaſterbrooke* was abſent to the prejudice of the plaintiff: Which he certainly was; for it is ſtated, that another perſon was hired during his abſence to do the buſineſs which he ought to have done. The opinion, that the receiving of a ſervant, after abſenting himſelf from his maſter's ſervice, does ſo far purge the abſence that a ſettlement may be gained, is founded upon a ſuppoſition, that the relation of maſter and ſervant continued during the abſence.

Saxby *verſ.* Kirkus.

The iſſuing of proceſs, under which a perſon has been arreſted, may be traverſed.

IN an action of debt upon a bail bond, the plaintiff alledged in his declaration; that a certain bill of *Middleſex* iſſued againſt *J. S.* that *J. S.* was arreſted thereupon; and that the defendant entered into the bail bond.

The

The defendant pleaded that ſuch a bill of *Middleſex* did not iſſue.

Upon a demurrer to this plea, it was holden to be good.

And by *Wright* J. (*Lee* Ch. J. being abſent.) At the common law the ſheriff could not take a bail bond, and the 23 *H.* 6. *c.* 10. by which he is empowered to do it, does only empower him, when the defendant is in cuſtody by virtue of a legal proceſs.

It has been ſaid; that in the caſe of *Watkins* v. *Parry*, *Trin.* 7 *G.* 1. it was holden upon a demurrer, that the arreſt is not traverſable in an action upon a bail bond, and it was with good reaſon ſo holden; for the conſequence, if the arreſt were traverſable in ſuch action, would be, that a bail bond would never be good, unleſs the party, againſt whom a proceſs had been iſſued, were expoſed by an actual arreſt: But it by no means follows, that the iſſuing of the proceſs is not traverſable. In the preſent caſe, the defendant had an undoubted right to traverſe the iſſuing of the bill of *Middleſex*; for if ſuch a bill did not iſſue, the bail bond is *ipſo facto* void, and conſequently the plaintiff has no ground of action.

After this opinion was delivered, a motion was made for leave to withdraw the demurrer and amend.

The court refuſed to make a rule to ſhew cauſe.

And by *Wright* J. it is not uſual to give leave to amend, after a demurrer has been argued, and the opinion of the court is known; and it is certainly improper to give leave in the preſent

preſent caſe, it being an action againſt bail, whom the court is always inclined to favour.

Rex *verſ.* The Churchwarden's and Overſeers of St. Helens, Abingdon.

The names of the perſons intended to be rated, ought to be mentioned in the notice of appeal to a Poor's rate.

UPON a rule to ſhew cauſe, why a Poor's rate ſhould not be quaſhed, it appeared; that a court of quarter ſeſſions, upon hearing the appeal of *Spinage and others*, who complained of being aggrieved by divers perſons being left out of a Poor's rate and otherways, had ordered the rate to be amended, by inſerting the names of ſixteen perſons, and by ſtriking out the name of one perſon.

The rule was made abſolute.

And by *Wright* J. (*Lee* Ch. J. being abſent) it has been objected; that the names of the perſons intended to be rated were not mentioned in the notice of appeal; and we are of opinion, that this objection is well founded. It is doubtful, whether the court had a power to inſert the name of any perſons in the rate, unleſs the names of the perſons intended to be rated were mentioned in the notice of appeal; for the power of amending a Poor's rate, which is given to a court of quarter ſeſſions by the 17 *G.* 2. *c.* 38. is confined to the amending it in ſuch manner only as ſhall be neceſſary in giving relief. There is another reaſon, why the names of the perſons, intended to be rated, ought to be mentioned in the notice of appeal to a Poor's rate; namely, that the pariſh officers, to whom notice of the appeal is to be given, may come prepared, to ſhew why thoſe perſons were not rated.

It

It has been objected; that the court had not a juriſdiction to ſtrike the name of any perſon out of the rate; it being no part of the complaint, that any perſon was rated who ought not to be rated: And we are inclined to be of opinion that the court had not. But if it ſhould be admitted, that under the word *otherways* in the complaint the court had a juriſdiction as to this, we are of opinion, that the name of the perſon intended to be ſtricken out of the rate ought to be mentioned in the notice of appeal, that the pariſh officers may come prepared to ſhew why that perſon was rated.

Rex *verſ.* Blower.

IN an indictment for a nuſance, the defendant was alledged to be of the pariſh of *Shepey;* and the nuſance was alledged to be in a highway in the pariſh of *Shepey.*

The defendant pleaded in abatement; that there are four vills in the pariſh of *Shepey;* and that it is not ſhewn in which of the vills the highway is.

It is not neceſſary, in an indictment for a nuſance in a highway, to ſhew in which of two vills in a pariſh the highway is.

Upon a demurrer to this plea, it was holden to be bad; and judgment of *Reſpondeas Ouſter* was given.

And by the court—As the defendant is alledged to be of the pariſh of *Shepey*, it would have been a good plea in abatement, that it is not ſhewn of which vill he is; for it is laid down 2 *Inſt.* 669. that if there be two vills in a pariſh, the addition of the pariſh is not ſufficient. But although there are two or more vills in a pariſh, it is not neceſſary, in an indictment for a nuſance in a highway in the pariſh, to ſhew in which of the vills the highway is.

Harding

Harding *verſ.* Wilkin.

The proceedings in an action of *Trover* are not to be ſtayed upon bringing the goods into court.

A Motion was made, that upon bringing into court a gold watch and a diamond ring, for the converſion of which the action was brought, the proceedings in an action of *Trover* might be ſtayed.

The court refuſed to make a rule to ſhew cauſe.

And by *Wright* J. (*Lee* Ch. J. being abſent) it has been ſaid; that in the caſe of (E) *Catling* v. *Bowling*, *Eaſt.* 26 *G.* 2. in this court, a rule was made to ſhew cauſe, why upon bringing a book into court, for the converſion of which an action of *Trover* had been brought, the proceeding in the action ſhould not be ſtayed: But the rule to ſhew cauſe in that caſe, which was contrary to the uſual courſe of the court, was granted upon the very particular circumſtances of the caſe, and the court never heard any more of that rule.

Grubb *verſ.* Smithers and Collins.

The recognizance of bail is forfeited upon the return *non eſt inventus* to the *Capias ad Satisfaciendum*.

UPON a rule to ſhew cauſe, why the proceedings ſhould not be ſtayed, it appeared; that the action was brought upon a recognizance entered into by the defendants, as bail of *J. S.* that a *Capias ad Satisfaciendum* had iſſued upon a judgment againſt *J. S.* to which the return was *non eſt inventus;* and that before there was any further proceeding upon the judgment, and before the preſent action was brought, *J. S.* died.

The rule was diſcharged.

(E) Ante page 80.

And

And by the court—When the proceeding againſt bail is by *Scire Facias* upon the recognizance, execution cannot be taken out upon the *Scire Facias*, unleſs the return thereto be *Scire Feci*; for if a *Nihil* be returned thereto, execution cannot be taken out, unleſs there is a return to a ſecond *Scire Facias*: But this is an indulgence of the court in favour of bail, that they may have ſo much further time to render the principal, and not a matter of right; for the recognizance, as is laid down in the caſe of *Widmore* v. *Clark and Havard*, Lord *Raym.* 157. is, in ſtrictneſs of law, forfeited upon the return of *non eſt inventus* to the *Capias ad Satisfaciendum*. In the preſent caſe it would anſwer no purpoſe, except that of delay, to ſtay the proceedings; for, the principal being dead, there never can be a render of him in diſcharge of the defendants.

Anonymous.

UPON a motion for an attachment, for reſcuing a perſon out of the hands of the ſheriff, it appeared; that the ſheriff had returned a *Reſcous*.

If a *Reſcous* be returned by a ſheriff, an attachment is to be awarded in the firſt inſtance.

An attachment was awarded.

And by the court—Whenever a *Reſcous* is returned by a ſheriff, an attachment is to be awarded in the firſt inſtance.

Rex *verſ.* Maſters.

An advertiſement, publiſhed by a huſband concerning his wife, is not a libel.

UPON a rule to ſhew cauſe, why an information ſhould not be filed for a libel upon *Anne Stone*, it appeared; that *Anne Stone* was a married woman; and that the defendant, who was a printer, had printed and publiſhed an advertiſement, which was now complained of as a libel, at the requeſt of her huſband, in order to reclaim her.

The rule was diſcharged.

And by the court—A huſband has a right to publiſh an advertiſement concerning his wife; and it muſt be a very ſtrong caſe indeed, in which this court will give leave to file an information for a libel, againſt the printer of the advertiſement.

Eaſter Term,

27 Geo. 2. 1754.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

MEMORANDUM. Sir *Dudley Ryder* took his ſeat, as Chief Juſtice of this court, the beginning of this term, in the room of Sir *William Lee*, the late Chief Juſtice, who died during the vacation, after laſt term.

Rex *verſ.* Berkley and Bragg.

UPON a rule to ſhew cauſe, why a *certiorari* ſhould not iſſue to remove an order made by the defendants, two juſtices of the peace, it appeared; that the order was to empower *Taylor*, a glaſs bottle maker at *Briſtol*, to deduct out of future duties charged upon them, a ſum of money ſufficient to reimburſe himſelf another ſum of money, which was

The king is not bound by the ſtatute, which limits the time for removing an order of juſtices of the peace.

adjudged by the defendants to be an overcharge in former duties charged upon him; and that the order had been made above ſix months.

The queſtion was, Whether the 13 *G.* 2. *c.* 18. whereby the time for removing an order of juſtices of the peace by a *Certiorari* is limited to ſix months, extends to the king?

It was holden that it does not.

And by *Ryder* Ch. J.—As it is not to be imagined, that the king will be guilty of vexatious delays, this ſtatute, which was profeſſedly made to prevent vexatious delays, occaſioned by the ſuing forth writs of *Certiorari*, for the removal of convictions, judgments, orders and other proceedings before juſtices of the peace, does not extend to the king. There is another reaſon, ariſing from a requiſite of this ſtatute, from whence it may be concluded, that it does not extend to the king; namely, that the party intending to ſue forth a *Certiorari*, is to give notice to the juſtice or juſtices of the peace before whom the proceeding was; for it has been conſtantly holden, that the word party in a ſtatute does not extend to the king.

Many caſes are mentioned, *Plowd.* 243, 244, wherein it has been holden; that the king is not bound by a ſtatute, unleſs he be expreſsly mentioned therein.

In the caſe of *Rex* v. *Farewell*, *Eaſt.* 17 *G.* 2. it was holden; that a *Certiorari* for removing an indictment for a nuſance in a highway lies for the king, although no affidavit has been made, and no recognizance has been entered into, both of which

which are required by divers ſtatutes, when ſuch an indictment is removed by a ſubject.

Ruſſel's Caſe.

UPON a motion againſt *Ruſſel*, an attorney, it appeared that a deed had been delivered to him by a client; and that, notwithſtanding an offer had been made, of paying him what was due from the client for fees and on other accounts, he refuſed to redeliver the deed.

A deed that has been delivered to an attorney by a client muſt, on payment of what is due, be redelivered.

A rule was made for *Ruſſel* to ſhew cauſe, why, upon the payment of what was due from the client for fees and on other accounts, he ſhould not re-deliver the deed?

And by *Ryder* Ch. J.—In *Howe's* caſe, *Hil.* 11 G. 1. in this court, a rule was made for *Howe*, an attorney, to re-deliver writings, for which he had given a receipt together with an undertaking to re-deliver them on demand; and that in default thereof, an attachment ſhould be awarded againſt him. A court of law ought, in a caſe like the preſent, to go as far as poſſible againſt the attorney, in order to deliver the client from the neceſſity of applying for relief to a court of equity.

As the court heard no more of the rule in the preſent caſe, it is probable, that the terms thereof were complied with.

Tilt

Tilt *verſ.* Bartlet and Wife.

If an action be againſt huſband and wife, and the wife ſurvive the huſband, ſhe is entitled to the coſts taxed under a rule of court.

UPON a rule to ſhew cauſe, why an attachment ſhould not be awarded againſt the plaintiff, it appeared; that a rule, for ſetting aſide the proceedings in this action for irregularity with coſts, had been made abſolute; that after the coſts had been taxed, purſuant to this rule, the defendant *Bartlet* died; that a demand of the coſts had, ſince his death, been made by the other defendant; and that the plaintiff had refuſed to pay them.

The queſtion was, Whether the widow be entitled to the coſts?

It was holden that ſhe is.

And by the court—If in an action brought by huſband and wife there be judgment of *Nonſuit*, the ſurvivor is liable to coſts; and *pari Ratione*, wherever coſts become due in an action by or againſt huſband and wife, the ſurvivor ought to receive them. If damages and coſts are recovered in an action brought by huſband and wife, and the huſband die after final judgment, the widow is entitled to the coſts as well as the damages; for theſe muſt always go together; and conſequently, as the executor of the huſband is not entitled to the damages, he cannot be entitled to the coſts. It is equally reaſonable, that a woman, who ſurvives her huſband, ſhould receive the coſts due under a rule of court, as that ſhe ſhould receive ſuch as are due upon a final judgment.

It

It has been ſaid; that in a caſe which has been cited, wherein the Dutcheſs of *Hamilton* was, after the death of the Duke, obliged to pay coſts due under a rule of court, the Dutcheſs was a party to the rule; it being a conſent rule, entered into by her together with the Duke in an ejectment: But the opinion of the court was not founded upon this diſtinction. It was, on the contrary, expreſsly laid down, that there is no difference, as to the obligation upon a woman, who ſurvives her huſband, to pay coſts, between ſuch as are due under a rule of court, and ſuch as are due upon a final judgment.

Mills and Another *verſ.* Gregory.

Common ſailors may join in a ſuit for wages, altho' the ſhip had not ſailed out of the river *Thames* when the wages became due.

UPON a rule to ſhew cauſe, why a prohibition ſhould not be awarded to a ſuit in the court of admiralty, it appeared; that the ſuit was inſtituted by two common ſailors for wages; and that the ſhip had not ſailed out of the river *Thames* when the wages became due.

The rule was diſcharged.

And by the court——One of the privileges of ſuing for wages in the court of admiralty is, that two or more mariners may join in a ſuit in that court, and not be put to the inconvenience of bringing ſeparate actions, which they muſt do, if they ſue in a court of common law. In the caſe of *Wells* v. *Oſmond*, 6 *Mod.* 238. it was holden; that a ſuit may be inſtituted in the court of admiralty, for wages which became due after a contract to go a voyage, although the voyage was put off.

Rex

Rex *verſ.* Burgeſs.

A *Certiorari* for removing an indictment, may be awarded upon the motion of the attorney-general without any affidavit.

UPON a motion by the attorney-general for a *Certiorari* to remove an indictment, it appeared; that the indictment was for obſtructing a highway leading through *Richmond* Park, and that it was found at an aſſize inthe county of *Surry*.

Wright J. had ſome doubt, whether a *Certiorari* ought to be awarded in the preſent caſe, without an affidavit that a private right will come in queſtion; ſuch an affidavit being, in his opinion, required by the 5 *W.* & *M. c.* 11.

For the ſake of removing this doubt an affidavit was produced, in which it was ſworn, that the right of the King will come in queſtion.

But the other three juſtices were of opinion, that it was not neceſſary to produce any affidavit.

And by them—The affidavit, required by the 5 *W.* & *M. c.* 11. is only required in the caſe of an indictment for not repairing a highway: Whereas the preſent indictment is for obſtructing a highway. But if the preſent indictment were within the meaning of that ſtatute: Yet, as the King is not therein expreſsly named, he is not bound thereby, and conſequently the attorney-general might have moved for a *Certiorari* without producing any affidavit.

Rex *verſ.* Goodall.

UPON a motion that the defendant, who was brought up by a *Habeas Corpus*, might be admitted to bail, it appeared; that the defendant was charged upon oath, with having been guilty of an offence made felony without benefit of clergy; namely, for being riotouſly aſſembled with divers others, and for beginning, when ſo aſſembled, to pull down a meeting-houſe; and that he was committed for this offence, by a warrant ſigned *Thomas Longford*, mayor.

It is not neceſſary, that an authority to commit ſhould appear in a warrant of commitment.

The defendant was remanded.

And by the court——It has been ſaid; that it does not appear in the warrant, that *Thomas Longford* was a juſtice of the peace, or that he had any authority to commit the defendant: But we are of opinion; that it is not neceſſary, that an authority to commit ſhould appear in a warrant of commitment.

In the caſe of *Elderton and others*, 6 *Mod.* 75. it is laid down by *Holt* Ch. J. that it need not appear in a warrant of commitment, that the perſon who iſſued the warrant was a juſtice of the peace. In the caſe of *Rex* v. *Talbot*, *Mich.* 4 *G.* 2. the authority of what is laid down by *Holt* Ch. J. in the caſe of *Elderton and others*, was recognized; and the following diſtinction, which is, in our opinion, a very ſenſible one, was taken; namely, that in a conviction an authority to convict muſt appear; becauſe convicting is a judicial act: But that an authority to commit need not appear in a warrant of commitment; becauſe the iſſuing of ſuch a warrant is a miniſterial act.

If it be not neceſſary, that an authority to commit ſhould appear in a warrant of commitment, the court will never intend a warrant of authority in the perſon who iſſued the warrant; but, until the contrary appear, will preſume that he had an authority.

Anonymous.

The relator in an information in the nature of a *Quo Warranto*, is liable to coſts for not proceeding to trial purſuant to notice of trial.

A Rule to ſhew cauſe, why the relator in an information in the nature of a *Quo Warranto* ſhould not pay coſts, for not proceeding to trial purſuant to notice of trial, was made abſolute.

And by the court——It is by the 9 *Ann. c.* 20. provided, that if judgment ſhall be given for the defendant in an information in the nature of a *Quo Warranto*, he ſhall recover his coſts againſt the relator; and it appears to be within the equity of that ſtatute, that the relator in ſuch information ſhould pay coſts, for not proceeding to trial purſuant to notice of trial.

Kemp *verſ.* Mackrill.

The evidence upon the trial of court iſſues may be given ſeparately. A forgery detected.

UPON the coming on of the trial of eleven iſſues, ſent by the court of Chancery to be tried at the bar of this court, it was propoſed by the council of one ſide; that the evidence as to every iſſue ſhould be gone through ſeparately; and the caſe of *The Earl of Thanet* v. *Sir Edward Snatchbull* was mentioned; in which three of five iſſues, ſent by a court of equity to be tried in a court of law, were tried in three different terms, and the other two were never tried.

The

The council of the other ſide made no objection to this propoſal: But added; that as it will be a material queſtion in three of the iſſues, whether the name *Mackrill* ſubſcribed to three exhibits, and the dates of thoſe exhibits, are of the hand-writing of *Mackrill;* it will be proper to examine all the witneſſes which are to be examined as to the hand-writing of *Mackrill*, upon the firſt iſſue in which this queſtion does ariſe; for that, otherwiſe, new witneſſes may be adduced as to this point, which ought not to be permitted.

It was hereupon ordered by the court; that the evidence upon every iſſue ſhall be gone through ſeparately; that each ſide ſhall give a liſt of the witneſſes intended to be examined upon any one iſſue; and that all the witneſſes which are to be examined as to the hand-writing of *Mackrill*, ſhall be examined upon the firſt iſſue, wherein the queſtion does ariſe, whether the name *Mackrill* ſubſcribed to an exhibit, and the date of the exhibit, are of the hand-writing of *Mackrill.*

And by *Deniſon* J.——It is very proper, that the evidence upon every iſſue ſhould be gone through ſeparately; it being abſolutely neceſſary, that the evidence upon every iſſue ſhould be diſtinguiſhed in ſumming up to the jurors, elſe they will not be able to form a proper judgment; and it will be extremely difficult for my lord chief juſtice to do this, if the evidence upon ſo many iſſues be given promiſcuouſly.

The material queſtion in this cauſe was, Whether the name of *Mackrill* ſubſcribed to two of three exhibits, and the date of thoſe exhibits, are of the hand-writing of *Mackrill?*

In order to prove that they are, ſeveral witneſſes, who had frequently ſeen *Mackrill* write, and were well acquainted with his hand-writing, ſaid; that the name *Mackrill* ſubſcribed to the three exhibits, and the dates thereof, are extremely like his hand-writing: But that the manner of the writing is not ſo eaſy as he uſed to write.

In order to prove that the name *Mackrill* ſubſcribed to the three exhibits, and the dates thereof, are not of the hand-writing of *Mackrill*, and particularly that the dates are not, three eminent opticians, an eminent engraver, and an eminent writing-maſter were examined, and agreed in ſaying; that they had meaſured the dates of the three exhibits, which were in all three the ſame, namely, *the* 28 *October* 1729, in nine different manners; and that every one of the nine meaſurings, was begun and ended at the ſame points in every date; and that every one did agree ſo exactly, that two of the dates muſt have been copies of the third; it being, as they conceived, impoſſible for any perſon, either by chance or with deſign, to have written the three dates ſo exactly alike, without copying two of them from the third. They added; that upon examining the back of one of the dates, it appeared to them; that a ſharp inſtrument had been drawn over the letters and figures, in a manner ſufficient to make the marks of the letters and figures upon a paper laid under the date; and that upon the marks ſo made letters and figures exactly agreeing therewith might be written: But that if this were done, the pen muſt, in order to make the written letters agree exactly with the marks, be carried ſlowly over the marks; and

and conſequently, that the manner of the writing would not appear ſo eaſy, as if the letters and figures had been written in the uſual way of writing.

Some other circumſtances of forgery were proved: But *Ryder* Ch. J. in ſumming up the evidence to the jurors, obſerved that the evidence of the witneſſes who had meaſured the names and dates was exceedingly material; and there is no doubt, that the verdict, which was that the name *Mackrill* ſubſcribed to three exhibits, and the dates thereof, were not of the hand-writing of *Mackrill*, was in a great meaſure founded thereupon.

Harding *verſ.* Stafford.

All notices in a cauſe are to be given to the attorney or agent in the cauſe.

UPON a rule to ſhew cauſe, why the inquiſition upon a writ of enquiry ſhould not be ſet aſide, it appeared; that, although the defendant had an attorney, the notice of executing the writ had been given only to the defendant himſelf.

The rule was made abſolute.

And by the court—If there be a known attorney in a cauſe, all notices muſt be given to him or to his agent.

Rex

Rex *verſ.* The Inhabitants of Whitchurch.

A ſettlement may be gained by executing the annual office of bailiff of a borough in a pariſh.

IN an order of ſeſſions it was ſtated; that about thirty years before the *Pauper* went to reſide in the pariſh of *Overton;* that he was ſoon after ſworn into the annual office of bailiff of a borough in that pariſh, and ſerved the office one whole year; that it is the duty of ſuch bailiff to examine weights and meaſures, and to warn perſons to ſerve upon juries in a court leet in the borough; that the *Pauper* did ſeveral times examine weights and meaſures, and did once warn perſons to ſerve upon a jury in the court leet; that the borough does not extend to more than a fifth part of the pariſh; that the authority of the bailiff is confined to the borough; and that it is the practice to appoint new comers into the pariſh to the office of bailiff, for the ſake of colt-ale.

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Overton?*

It was holden that he did,

And by the court—It is by the 3 *W.* & *M. c.* 11. declared, that if any perſon who comes to inhabit in a pariſh, ſhall execute a publick annual office or charge in the pariſh one whole year, he ſhall gain a ſettlement.

It has been ſaid; that as the *Pauper* did execute the annual office of bailiff in only a ſmall part of the pariſh, he did not gain a ſettlement: But in the caſe of *Rex* v. *The Inhabitants of Fittleworth, Mich.* 18 *G.* 2. it was holden;

holden; that a ſettlement may be gained by executing the annual office of tithing man of a manor in a pariſh a whole year, although the manor be not co-extenſive with the pariſh; it not being required by the ſtatute, that the annual office ſhould be executed all over the pariſh.

Trinity

Trinity Term,

27 & 28 Geo. 2. 1754.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter,
} *Juſtices.*

Mills *verſ.* Long.

A ſurgeon of a ſhip may ſue in the court of admiralty, for wages. A mariner may ſue in the court of admiralty, for wages due upon a contract in writing entered into upon land.

UPON a rule to ſhew cauſe, why a prohibition ſhould not be awarded to a ſuit in the court of admiralty, it appeared; that the ſuit was inſtituted by the ſurgeon of a ſhip, for wages due upon a contract in writing entered into upon land.

One queſtion was, Whether the ſurgeon of a ſhip could ſue in the court of admiralty for wages?

Ryder Ch. J. *Wright* J. and *Deniſon* J. were of opinion that he might.

Foſter J. at firſt doubted: But he afterwards concurred in opinion with the other juſtices.

And

And by *Ryder* Ch. J.—As the ſurgeon of a ſhip is under the command of the maſter; and is as much obliged, if called upon by the maſter, to aſſiſt in navigating the ſhip, as the carpenter, he is to be deemed a mariner. In the caſe of *Hook* v. *Moreton*, Lord *Raym.* 398, it is ſaid; that the court ſeemed to be of opinion; that a mate of a ſhip may ſue as a mariner in the court of admiralty for wages. In *Madox's* caſe, 10 *Mod.* 526, it ſeems to have been admitted, that the ſurgeon of a ſhip may ſue in the court of admiralty for wages.

Upon conſidering all the caſes, we are of opinion; that the privilege of ſuing in the court of admiralty for wages, does extend to every perſon employed on board a ſhip, except the maſter.

Another queſtion was, Whether a ſuit could be inſtituted in the court of admiralty by a mariner, for wages due upon a contract in writing entered into upon land.

It was holden that it might.

And by *Ryder* Ch. J.—it appears from the caſe of *Opy* v. *Addiſon*, 12 *Mod.* 38, that although a contract for wages, entered into by a mariner upon land, be in writing, the contract, if the writing be not under ſeal, is only to be conſidered as a parol contract, and a ſuit may be inſtituted in the court of admiralty for the wages thereupon due. But if there were heretofore any doubt as to this point, it is entirely removed by the 2 *G.* 2. *c.* 36. By *par.* 1. of that ſtatute every mariner is required to enter into a contract in writing for his wages: But it is by *par.* 8. provided; "that no mariner ſhall, by entering

" into ſuch contract in writing, be deprived " or hindered from uſing any means or me- " thods for the recovery of wages, againſt " any ſhip, the maſter or owner thereof, " which he may now lawfully make uſe " of."

Rex *verſ.* Briſtow.

An indictment quaſhed for want of juriſdiction in the court of quarter ſeſſions.

UPON a motion to quaſh an indictment, found at a court of quarter ſeſſions, it appeared; that the charge in the indictment was, that the defendant acted as bailiff of the borough of *Haſlemere*, without having taken the oath of allegiance, and without having received the ſacrament within the ſpace of ſix months. As a ground for quaſhing the indictment it was ſaid; that a court of quarter ſeſſions has not a juriſdiction in ſuch caſe.

A rule was made to ſhew cauſe; which, no cauſe being ſhewn, was afterwards made abſolute.

Collins *verſ.* Reniſon.

The throwing down of a ladder, upon which a perſon is ſtanding, is not juſtifiable.

IN the declaration, in an action of treſpaſs, it was alledged; that the defendant overturned a ladder, upon which the plaintiff was ſtanding, and threw the plaintiff from it upon the ground.

The defendant pleaded; that he was in poſſeſſion of a certain garden; and that the plaintiff, againſt the will of the defendant, erected a ladder in the garden, and went up the ladder, in order to nail a board to the houſe of the plaintiff; that the defendant forbid the plaintiff ſo to do, and deſired him to come

come down; and that upon the plaintiff's perſiſting in nailing the board, he gently ſhook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as poſſible to the plaintiff.

Upon a demurrer to this plea, it was holden to be bad.

And by *Ryder* Ch. J.—Such force, as was uſed in the preſent caſe, is not juſtifiable in defence of the poſſeſſion of land. The overturning of the ladder could not anſwer the purpoſe of removing the plaintiff out of the garden; ſince it only left him upon the ground at the bottom of the ladder, inſtead of being upon it.

And by *Deniſon* J.—As only the ladder was in the preſent caſe *damage feaſant*, it was no more lawful to throw this down, whilſt the plaintiff was upon it, than it is to diſtrain a horſe *damage feaſant*, whilſt a man is upon the horſe's back, which it is not lawful to do.

Rex *verſ.* Stanley and his Bail.

A recognizance for keeping the peace is forfeited by an aſſault upon any perſon.

UPON a rule to ſhew cauſe, why the proceedings upon a *Scire Facias* ſhould not be ſtayed, it appeared; that the *Scire Facias* was brought upon a recognizance entered into by *Stanley* and his bail, for *Stanley*'s keeping the peace; that the recognizance was entered into in conſequence of articles of peace having been exhibited by *J. S.* againſt *Stanley*; and that *Stanley* had been guilty of aſſaulting *J. N.*

The rule was diſcharged.

And by *Ryder* Ch. J.—If the peace have not been broken by an aſſault upon the perſon who exhibited articles of the peace, the court will not permit a proceeding by *Scire Facias* upon a recognizance for keeping the peace, if the proceeding appear clearly to be vexatious: Yet, as ſuch recognizance is for keeping the peace to all the king's ſubjects, as well as to the perſon who exhibited the articles, the court will not in a doubtful caſe ſtay the proceedings upon a *Scire Facias;* becauſe the queſtion, whether the breach of the peace by aſſaulting another perſon did amount to a forfeiture of the recognizance, may be determined upon the plea of not guilty to the *Scire Facias*.

Rex *verſ.* Williams.

It is a good return to a *Mandamus* for electing an officer, that there has been an election.

UPON a ſuggeſtion, that no portreeve was elected for the borough of *St. Michaels* upon the charter day, a *mandamus* was awarded, directed to the ſteward of a court leet in the borough; whereby he was commanded to hold a court leet, and impanel and ſwear a jury; and to charge the jury to elect and ſwear ſome perſon into the office of portreeve of the ſaid borough.

The return of the ſteward to this *mandamus* was; that in obedience to the command of the writ, he had holden a court leet, and impanelled and ſworn a jury; and had charged the jury to elect and ſwear ſome perſon into the office of portreeve of the borough; that it was found by the jury that *J. S.* was duly elected and ſworn into the office of portreeve of the borough upon the charter day; and that therefore no ptrſon could be elected and ſworn into the office of portreeve of the borough, as by the writ was commanded,

The

The queſtion was, Whether this return be good?

It was holden that it is.

And by *Ryder* Ch. J.—The ſteward has paid obedience to the writ, as far as it was in his power by his own acts to do it.

It has been ſaid, that this return is bad; becauſe, inſtead of being poſitive, it is argumentative: But we are of opinion, that it is ſufficiently poſitive as to the principal fact; namely, that a perſon was duly elected and ſworn into the office of portreeve of the borough upon the charter day. If this fact be true, there ought not to be any election. If it be not true, an action may be brought for a falſe return: But at preſent it is by no means proper for the court to award a peremptory *Mandamus*.

Wyndham *verſ.* Bowen.

IN an action of debt upon a bond, the condition of which was, that the defendant ſhould reſign a living upon a requeſt; the plaintiff declared, as adminiſtrator with the will annexed of *Catharine Wyndham*; and alledged, that the two perſons appointed executors by her will were both dead.

A temporal court will always give credit to the judicial acts of a ſpiritual one.

Upon a demurrer to this declaration, it was holden to be good.

And by *Ryder* Ch. J.—The council for the defendant did begin to argue againſt the validity of this bond; but as it has been frequently holden, that a bond to reſign a living upon requeſt is valid, it was improper for the court to permit that point to be argued.

It

It has been ſaid; that it is not alledged in the declaration, that the ſurviving executor of *Catharine Wyndham* died inteſtate; and that unleſs ſuch executor did die inteſtate, the ſpiritual court had not a juriſdiction to grant letters of adminiſtration with the will annexed to the plaintiff: But we are of opinion; that it was not neceſſary for the plaintiff to ſhew, that the ſurviving executor did die inteſtate. It being a ſettled point, that a temporal court ought always to give credit to the judicial acts of a ſpiritual one, this court will not in the preſent caſe preſume, that the ſpiritual court has acted wrong in granting letters of adminiſtration to the plaintiff. It would have been ſufficient, for the plaintiff to have declared as adminiſtrator with the will annexed of *Catharine Wyndham*; and conſequently the allegation, her two perſons were appointed executors by her will, which was unneceſſary, may be rejected as ſurpluſage.

Rex *verſ.* Wannop.

The eſtate of the perſon expelled muſt be ſhewn in an indictment for a forcible entry.

UPON a rule to ſhew cauſe, why an indictment ſhould not be quaſhed, it appeared; that the indictment was for a forcible entry; and that the premiſes from which the expulſion was, were the freehold and inheritance of the lady of the manor: But it did not appear, what eſtate the perſon expelled had in the premiſes.

The rule was made abſolute.

And by the court—It appears from the caſe of *Rex* v. *Dorny*, *Salk.* 260. and from an anonymous caſe, 1 *Ventr.* 89. that an indictment for a forcible entry is bad, if it do not therein

therein appear what eſtate the perſon expelled had in the premiſes: And it is abſolutely neceſſary that this ſhould appear; otherwiſe it will be uncertain, whether any one of the ſtatutes relative to forcible entries does extend to the eſtate from which the expulſion was. The 5 *R.* 2. *c.* 7. the 15 *R.* 2. *c.* 2. and the 8 *H.* 6. *c.* 9. do only extend to freehold eſtates; and the 21 *J.* 1. *c.* 15. does only extend to eſtates holden by tenants for years, tenants by copy of court roll, and tenants by elegit, ſtatute merchant and ſtatute ſtaple.

Rex *verſ.* Boys.

An indictment lies for not paying the coſts awarded by an order of ſeſſions.

UPON a demurrer to an indictment, for refuſing to pay the coſts awarded by an order of ſeſſions upon the diſmiſſion of an appeal to a poor's rate, it was objected; that the charge in the indictment is not poſitive, but by way of recital: It being in this manner; whereas the Reverend *J. S.* did appeal, &c. this court doth diſmiſs the appeal as being frivolous, and doth award twenty ſhillings coſts, to be paid by the Reverend *J. S.* to the overſeers of the poor of the pariſh of *Redburn*.

This objection was over-ruled.

And by the court—It was neceſſary to ſet out the order of ſeſſions in the indictment, and it was proper to ſet it out as it is done in the words of the order: But this is only matter of inducement; for the offence charged in this indictment is, that the defendant refuſed to pay the coſts awarded, and it is charged poſitively that he did refuſe.

Another

Another objection was; that as the 17 *G.* 2. *c.* 38. by which power is given to a court of quarter ſeſſions of awarding coſts upon diſmiſſing an appeal to a poor's rate, does only impower that court to award coſts, in the ſame manner as it is empowered by the 8 & 9 *W.* 3. *c.* 30. to do, upon diſcharging an appeal concerning the ſettlement of a poor perſon, an indictment will not lie in the preſent caſe: Inaſmuch as the remedy given by the 8 & 9 *W.* 3. *c.* 30. is in the firſt place a diſtreſs and ſale of the goods diſtrained; and if the perſon who refuſes to pay the coſts have no goods, he may be committed to priſon for the ſpace of twenty days.

This objection was over-ruled.

And by the court—The remedies given by the 8 & 9 *W.* 3. are only given where the perſon, who refuſes to pay the coſts, lives out of the juriſdiction of the court by which they are awarded; and conſequently an indictment, which is the general method of proceeding againſt a perſon guilty of diſobedience to an order of ſeſſions, will lie.

Rex *verſ.* The Juſtices of the Court of Quarter Seſſions of the County of Surry.

The court will not make a rule for the inſpecting of books, until a return is made to a *Mandamus*.

A Rule having been obtained for the defendants to ſhew cauſe, why a *Mandamus* ſhould not be awarded, directed to the juſtices of the court of quarter ſeſſions of the county of *Surry*, for admitting the proſecutor to the office of clerk of the peace of that county, the court was moved on the behalf of

of the proſecutor, for a rule to inſpect and take copies of the books and records in the cuſtody of the perſon who officiated as clerk of the peace of that county.

No rule was made.

And by the court—If a rule be made to ſhew cauſe why an information ſhould not be filed, the court will make a rule for the proſecutor to inſpect and take copies of books and records, as ſoon as the rule to ſhew cauſe is made: But if a rule be made to ſhew cauſe why a *mandamus* ſhould not be awarded, the court will not make a rule for the proſecutor to inſpect and take copies of books and records, until the rule is made abſolute, and a return is made to the *mandamus*.

Rex *verſ.* Williams.

An information againſt a goaler, for ſuffering a priſoner to go at large, refuſed.

UPON a motion, for leave to file an information againſt a goaler, it appeared; that the goaler had ſuffered a perſon, committed upon an attachment for non-payment of coſts, to go at large.

A rule to ſhew cauſe was refuſed.

And by the court—The ordinary remedy, by an action for the eſcape, is in this caſe ſufficient.

Rex *verſ.* Driffield.

An indictment will not lie for a breach of contract.

UPON a rule to ſhew cauſe, why the indictment ſhould not be quaſhed, it appeared; that the indictment was for a cheat, in delivering a quantity of coals as and for two buſhels; whereas the quantity of coals delivered was, in fact, no more than one buſhel and three pecks.

The rule was made abſolute.

And by the court—As there was not in this caſe any falſe token, it is nothing more than a breach of contract, and conſequently an indictment will not lie.

Rex *verſ.* Barton.

The *Venue* cannot be changed in an information for a falſe return to a *Mandamus*.

UPON a rule to ſhew cauſe, why the *Venue* in an information ſhould not be changed, from the county of the town of *Nottingham* to the county of *Nottingham*, or to any other county, it appeared; that the information was for a falſe return to a *mandamus*; that the matter in iſſue was, whether there ought to be a common council conſiſting of twenty-four perſons in the corporation of *Nottingham*; and that there are not in the county of the town of *Nottingham* a ſufficient number of freeholders for compoſing a jury, who are not burgeſſes of the corporation.

The rule was diſcharged.

And

And by the court—The caſe of *The Mayor of Orford*, *Salk.* 669. has been mentioned; in which it is ſaid; that the court inclined to change the *venue*, in an action upon the caſe for a falſe return to a *mandamus*: But that caſe, it being a civil action, would not, even if the *venue* had been changed, have been an authority in the preſent caſe.

It has been ſaid; that as the information is, in the preſent caſe, to try the truth of a return to a *mandamus*, it is in the nature of a civil action: But no caſe has been cited; wherein the *venue* has been changed in an information.

It is ſeldom neceſſary, that the perſons who ſerve upon juries in cities, boroughs and towns corporate ſhould be freeholders; and it does not appear, that only ſuch perſons as are freeholders can ſerve upon juries in the town of *Nottingham*.

Rex *verſ.* Botwright.

UPON a motion to quaſh an indictment, it appeared; that the indictment was for expoſing to ſale the fleſh of a bull, which the defendant had killed without having firſt baited it, as and for ſteer beef.

An indictment will not lie for ſelling bull beef, as and for ſteer beef.

A rule was made to ſhew cauſe; which, no cauſe being ſhewn, was afterwards made abſolute.

Rex *verſ.* The Juſtices of the County of Middleſex.

Only ſuch places in a pariſh, as are townſhips or vills, are entitled to have ſeparate overſeers of the poor.

UPON a rule to ſhew cauſe, why a *mandamus* ſhould not be awarded, directed to the juſtices of the peace of the county of *Middleſex*, for appointing overſeers of the poor for *Kentiſh Town*, it appeared; that *Kentiſh Town* is the north diviſion of the pariſh of *St. Pancras*.

The rule was diſcharged.

And by *Ryder* Ch. J.—It has been long ſettled; that the power given by the 13 & 14 *Ch.* 2. *c.* 12. of appointing ſeparate overſeers of the poor for a *Townſhip* or *Vill* in a pariſh, may be exerciſed in other counties, as well as in thoſe which are mentioned in that ſtatute: But it does not appear, that *Kentiſh-Town* is either a *Townſhip* or *Vill* in the pariſh of *St. Pancras*; and it was holden in the caſe of *Rex* v. *The Inhabitants of Welbeck*, *Mich.* 14 *G.* 2. that the 13 & 14 *C.* 2. does only extend to ſuch places in pariſhes as are *Townſhips* or *Vills*.

It has been ſaid; that the pariſh of *St. Pancras* is very large, and that the diviſion of *Kentiſh-Town* is large and very populous: But neither the largeneſs nor the populouſneſs of a diviſion in a pariſh, even if it were a *Townſhip* or *Vill*, is a reaſon for the inhabitants thereof to have ſeparate overſeers of the poor, unleſs it appear, that, by reaſon of the largeneſs of the pariſh, they *have not reaped*, or *cannot reap* the benefit of the 43 *Eliz. c.* 2,

For

For the right of having ſeparate overſeers of the poor for a *Townſhip* or *Vill* in a pariſh, is only given by the 13 & 14 *Ch.* 2. where the inhabitants of the *Townſhip* or *Vill*, by reaſon of the largeneſs of the pariſh, *have not reaped* or *cannot reap* the benefit of the 43 *Eliz.* There is not the leaſt ground for ſaying, that the inhabitants of the diviſion of *Kentiſh-Town*, if it were a *Townſhip* or *Vill*, *have not reaped*, or *cannot reap* the benefit of the 43 *Eliz.* It does on the contrary appear; that from the time of making that ſtatute to the preſent time, they *have conſtantly reaped* the benefit thereof.

Wilmot *verſ.* Butler and Wife.

A wife may be taken in execution, upon a judgment againſt her and her huſband.

UPON a rule to ſhew cauſe, why the wife ſhould not be diſcharged out of cuſtody, it appeared; that ſhe was in cuſtody under a *Capias ad Satisfaciendum*, which iſſued upon the judgment in this action.

The rule was diſcharged.

And by the court—In the caſe of *Pitts* v. *Miller and Wife*, *Trin.* 15 *G.* 2. in this court, it was holden; that if a wife be in cuſtody upon meſne proceſs, which iſſued in an action againſt her and her huſband, ſhe is entitled to a diſcharge: But that if ſhe be in cuſtody under a *Capias ad Satisfaciendum*, which iſſued upon the judgment in an action againſt her and her huſband, ſhe is not entitled to a diſcharge; unleſs it appear, that her being in cuſtody is the conſequence of ſome fraud or colluſion betwixt the plaintiff and her huſband; for that execution muſt always follow the judgment. In the caſe of *Pitts* v. *Miller and Wife*, the caſe of *Jackſon* v. *Gabree and Wife*, 1 *Ventr.* 51. which has been cited and relied

relied on in the preſent caſe, was cited and relied on: But the authority thereof was denied by the court. In the caſe of *Finch and wife* v. *Duddin and wife*, *Mich.* 19 *G.* 2. in this court; and wherein the defendant's wife, being in cuſtody, under a *Capias ad Satisfaciendum* which iſſued upon the judgment, a motion was made that ſhe might be diſcharged: But as it appeared; that endeavours had been uſed to take the huſband as well as the wife, the court refuſed to make a rule for her diſcharge.

Savery *verſ.* Serle.

An amendment of the declaration after two terms, the conſequence of which was changing the *Venue*.

UPON a rule to ſhew cauſe, why the plaintiff ſhould not have leave to amend his declaration, by ſtriking out the word *Middleſex*, and inſerting the word *Devonſhire*, it appeared; that the declaration was of *Hilary* term laſt; that the defendant had pleaded; and that the conſequence of the amendment would be changing the *Venue* from *Middleſex* to *Devonſhire*.

Ryder Ch. J. *Wright* J. and *Foſter* J. being of opinion, that leave ought to be given to amend, the rule was made abſolute.

And by *Ryder* J.—It has been long ſettled; that the *venue* cannot be changed in a direct way, after the defendant has pleaded: But the court has of late years frequently permitted this to be done in an oblique way by amendment.

Deniſon J. was of opinion; that leave ought not to be given to amend.

And

And by him—The amendment in the preſent caſe will amount to the adding of a new count, which, according to the ſettled practice of the court, cannot be done after two terms.

Holt on the Demiſe of Simpſon *verſ.* Ward.

UPON a rule to ſhew cauſe, why the appearance of *Ward* the tenant ſhould not be ſet aſide, it appeared; that Sir *Harry Slingſby*, landlord of the premiſſes in queſtion, had obtained the common rule to appear, and be made defendant with *Ward*, in caſe he ſhould appear; that *Ward* did not appear; that Sir *Harry* did appear; that iſſue was joined, and the cauſe carried down to the aſſizes in order to be tried; that at the aſſizes an agreement was entered into, for paying off the money due upon a mortgage by inſtalments; that in conſequence of this agreement the cauſe was not tried; and that after all this had paſſed *Ward* entered an appearance.

The tenant cannot appear to a declaration in an action of ejectment, after the time allowed for his appearance is elapſed.

Wright J. was of opinion; that the tenant may enter an appearance to a declaration in an action of ejectment, at any time before judgment is ſigned againſt the caſual ejector.

Ryder Ch. J. *Deniſon* J. and *Foſter* J. were of opinion; that although judgment be not ſigned againſt the caſual ejector, the tenant is precluded from appearing to a declaration in an action of ejectment, unleſs he do appear before the time allowed to appear in is elapſed: The rule made upon the motion for judgment againſt the caſual ejector being; that in caſe the

the tenant do not appear, within the time therein allowed for his appearance, judgment may be ſigned againſt the caſual ejector.

The rule was made abſolute.

Rex *verſ.* Chatley and Another.

An indictment will not lie, for not making a new Poor's rate purſuant to an order of ſeſſions.

UPON a rule to ſhew cauſe, why an indictment ſhould not be quaſhed, it appeared; that the defendants were overſeers of the poor of a pariſh, and that the indictment was for diſobedience to an order of ſeſſions; by which they were required to make a new Poor's rate for the pariſh.

The rule was made abſolute.

And by the court—Although the court of quarter ſeſſions, in caſe it ſhall be neceſſary, upon an appeal to a Poor's rate, to quaſh the whole rate, are required by the 17 *G.* 2. *c.* 38. *par.* 6. to order the Church-wardens and overſeers of the poor to make a new rate, and they are thereby required to make the ſame: Yet an indictment will not lie for diſobedience to an order of ſeſſions for making a new rate; another remedy being given by *par.* 14. of the ſame ſtatute; namely, "that if any over-"ſeer of the poor of any pariſh, townſhip "or place, ſhall neglect or refuſe to obey the "orders and directions of this act, or any of "them, where no penalty is before provided "by this act, every ſuch overſeer ſhall for "every ſuch offence, on oath made thereof "within two calendar months before two "juſtices of the peace, forfeit for the uſe of "the poor of ſuch pariſh, townſhip or place, "a ſum not exceeding five pounds, nor leſs "than twenty ſhillings, to be levied by diſtreſs "and

" and ſale of the offender's goods, by war-
" rant from ſuch juſtices; which ſum ſhall
" be paid to ſome Churchwarden or overſeer
" of ſuch pariſh, townſhip or place, for the
" purpoſes aforeſaid."

Pilkington *verſ.* Hamlin.

UPON a rule to ſhew cauſe, why the *venue* ſhould not be changed, it appeared; that the plaintiff was an attorney of this court.

The *Venue* ought not to be changed, in an action brought by an attorney in the court of which he is an attorney.

The rule was diſcharged.

And by the court—The caſe of *Biſſe* v. *Harcourt*, *Carth.* 126. has been cited; wherein it was ſaid by *Dolben* J. that he remembered a caſe, in which the *venue* was changed, altho' the plaintiff was an attorney: But the opinion of the other juſtices in that caſe was; that the *venue* ought not to be changed in ſuch caſe upon the common affidavit.

It is the part of the privilege of an attorney; that, if he bring an action in the court of which he is an attorney, the *venue* ought not to be changed; and the court will not deprive him of this part of his privilege, unleſs there is ſome very particular and ſtrong reaſon for doing it.

Anonymous.

A plaintiff, at whoſe ſuit a defendant has been taken in execution, may remove him into the cuſtody of the marſhall.

UPON a rule to ſhew cauſe, why the defendant ſhould not be remanded to the cuſtody of a ſheriff, it appeared; that after the defendant was in the cuſtody of the ſheriff, under a writ of *Capias ad Satisfaciendum*, the plaintiff removed him by a *Habeas Corpus* into the cuſtody of the marſhall.

The rule was diſcharged.

And by the court—A plaintiff in this court, at whoſe ſuit a defendant has been taken in execution, may, if he pleaſe, remove the defendant into the cuſtody of the marſhall.

Fox *verſ.* Cope.

Proceedings ought not to be ſet aſide after the verdict, on account of a miſtake in the copy of the declaration.

UPON a rule to ſhew cauſe, why the proceedings ſhould not be ſet aſide for irregularity, it appeared; that in the copy of the declaration delivered, there was the word *London* where the word *Middleſex* ought to have been: But it likewiſe appeared; that the record of *Niſi Prius* was right; that the cauſe had been tried; and that there was a verdict for the plaintiff.

The rule was diſcharged.

And by the court—As the record of *Niſi Prius* is right, it would be very improper, for the court to ſet aſide the proceedings, in a cauſe after the merits have been tried, on account of a miſtake in any part of the pleadings whilſt they were in paper.

Anonymous.

Anonymous.

A trial at bar is not to be granted before iſſue is joined.

UPON a motion for a trial at bar, it appeared; that iſſue was not joined in the action.

The court refuſed to make a rule to ſhew cauſe.

And by *Ryder* Ch. J.—It is contrary to the practice of the court, to grant a trial at bar in any action before iſſue is joined, except in an action of ejectment; in which, as iſſue is very ſeldom joined till the term is over, it would in the general be too late to apply for a trial at bar after it is joined.

Michaelmas Term,

28 Geo. 2. 1754.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter, } *Juſtices.*

Harriſon, Chamberlain of the City of London, *verſ.* Alexander.

A writ of *Procedendo* awarded, although a writ of *Superſedeas* to a writ of privilege was refuſed.

THIS action being brought in the court of the mayor of the city of *London*, the defendant, who was an attorney of this court, ſued out a writ of *Privilege*.

The plaintiff, upon being ſerved with this writ, obtained a rule to ſhew cauſe, why a writ of *Superſedeas* ſhould not be awarded: and why a writ of *Procedendo* ſhould not be awarded.

The

The court refuſed to award a writ of *ſuperſedeas*. A writ of *procedendo* was awarded: But it was by the expreſs order of the court inſerted in the rule for awarding the writ of *procedendo*, that this writ is to be without prejudice to the defendant's pleading his privilege in the court below.

And by the court—If a writ of *ſuperſedeas* ſhould be awarded, which would be a determination of this court, that the defendant is not entitled to privilege; and the court below ſhould, upon the defendant's pleading privilege, determine that he is entitled to privilege, or any other court upon an appeal from that court ſhould ſo determine, there would be a claſhing of determinations.

On the other hand, if this court ſhould refuſe to award a writ of *procedendo*, it would be a determination of this court that the defendant is entitled to privilege; and as this determination, it being upon a motion, muſt be final, the plaintiff would be thereby precluded, from having the opinion of any other court upon the queſtion of privilege, which, it being a queſtion of very extenſive conſequence, ought to be determined in the moſt ſolemn manner. It is however proper, to have it inſerted in the rule for awarding the writ of *procedendo*, that this writ is to be without prejudice to the defendant's pleading his privilege in the court below; leſt there ſhould be an apprehenſion, that this court has determined any thing as to the queſtion of privilege.

Emmerſon

Emmerſon and Wife *verſ.* Cavendiſh, Vicar General to the Biſhop of Durham.

Reſiding out of the juriſdiction of an eccleſiaſtical court, is a good cauſe of prohibition.

UPON a rule to ſhew cauſe, why a prohibition ſhould not be awarded to the conſiſtory court of the Biſhop of *Durham*, it appeared; that the reſidence of the defendant in the cauſe in the conſiſtory court was out of the juriſdiction of that court; namely, in *Scotland*.

The rule was made abſolute.

Rex *verſ.* Rollo.

An indictment for piſſing in a room, in which two women were preſent, ought not to be quaſhed.

UPON a rule to ſhew cauſe, why an indictment ſhould not be quaſhed, the charge in the indictment appeared to be; that the defendant did unlawfully and with force and arms enter the dwelling-houſe of the proſecutor; and did indecently, unlawfully, injurioufly and impudently piſs upon the floor of a certain room in the ſaid dwelling-houſe, in which the wife of the proſecutor and the wife of *J. S.* were perſonally preſent; and that the defendant had pleaded to the indictment.

The rule was diſcharged.

And by the court—It has been ſaid; that this rule ought to be diſcharged, becauſe the defendant had pleaded to the indictment before the motion was made to quaſh it: But this is no reaſon for diſcharging the rule; it not being an objection to the quaſhing of an indictment, that the defendant has pleaded thereto.

It

It has been ſaid; that an indictment will not lie for what was done by the defendant. If it were neceſſary for the court to give any opinion as to this, the opinion would probably be; that what the defendant did was *contra bonos mores*, and conſequently that an indictment will lie: But however that may be, the preſent is by no means a caſe, in which the court ought to exerciſe its diſcretionary power of quaſhing an indictment.

Rex *verſ.* Aſhton.

A *Mandamus* awarded, for reſtoring a perſon to the office of pariſh clerk.

UPON a rule to ſhew cauſe, why a *mandamus* ſhould not be awarded for reſtoring the defendant to the office of pariſh clerk, it appeared; that the defendant was appointed to the office by the parſon.

The rule was made abſolute.

And by *Ryder* Ch. J.—It has been ſaid; that as the defendant was appointed to the office by the parſon, his right thereto is an eccleſiaſtical right; and conſequently, that he is not entitled to a *mandamus*, which is a temporal remedy for reſtoring him to the office: But as a pariſh clerk, whether appointed by the parſon or elected by the pariſhioners, has a freehold in his office, he ought not to be removed therefrom without good cauſe; and it is by no means proper to determine upon a motion, whether the perſon, who has been removed from the office of pariſh clerk, was removed for good cauſe.

Deniſon J. inclined to be of opinion; that the right to the office of pariſh clerk is a temporal right.

Foſter

Foſter J. was clearly of opinion, that the right to the office of pariſh clerk is a temporal right; and he added, that a pariſh clerk, although he were appointed to the office by the parſon, is a ſervant to the pariſhioners.

Rex *verſ.* Fiſher and Others Juſtices of the Peace for the County of Berks.

An abſolute rule for a *mandamus* to juſtices of the peace to allow a poor's rate.

UPON a motion, for a *mandamus* to the defendants to allow a poor's rate, it appeared; that the rate was regularly made; and that the defendants had refuſed to allow it.

The court had at firſt ſome doubt, whether there ought not to be a rule to ſhew cauſe: But after a little conſideration, an abſolute rule was made.

And by *Ryder* Ch. J.—It is not proper to make a rule to ſhew cauſe in this caſe; becauſe, while the rule is depending, the poor may ſuffer; no overſeer of the poor being obliged to diſburſe money, until he has obtained a rate for collecting it.

Bowen *verſ.* Barnett.

Special bail is not always neceſſary, in an action of debt upon a judgment.

UPON a rule to ſhew cauſe, why there ſhould not be ſpecial bail in an action of debt upon judgment, it appeared; that one of the ſpecial bail in the original action had abſconded; and that the other was become inſolvent.

The rule was diſcharged.

And

And by the court—It has been frequently holden; that if there was ſpecial bail in the original action, and the plaintiff in that action bring an action of debt upon the judgment therein obtained, he is not entitled to ſpecial bail in the latter action. As there is a degree of vexation in bringing an action of debt upon a judgment, ſuch an action ought not to be favoured.

Rex *verſ.* Hood.

UPON a motion to quaſh an indictment, the charge in the indictment appeared to be; that the defendant did unlawfully and injurioufly knock violently at the outer door of the proſecutor's dwelling-houſe for the ſpace of two hours together; whereby the family of the proſecutor was greatly diſturbed; and the proſecutor's wife was ſo much frighted, that ſhe miſcarried ſoon after.

An indictment, for knocking violently at the door of a houſe, ought not to be quaſhed.

The court refuſed to make a rule to ſhew cauſe.

And by *Ryder* Ch. J.—It has been ſaid; that as there is not a charge of a forcible entry, the proper remedy of the proſecutor is an action of *treſpaſs:* But it is ſufficient to ſay, without giving any opinion as to the goodneſs of the indictment, that it would be very improper for the court to exerciſe its diſcretionary power of quaſhing an indictment, in a caſe wherein the knocking at the door of a dwelling-houſe was ſo violent, ſo long continued, and followed with ſuch conſequences as it was in the preſent caſe.

Pantſune *verſ.* Marſhall.

The plaintiff, in an action for maliciouſly proſecuting an action, muſt ſhew that the former action is determined in his favour.

IN an action, for the malicious proſecution of an action, the plaintiff declared; that the defendant levied a plaint againſt him in the court of *Newcaſtle upon Tyne*; that in order to hold the plaintiff to ſpecial bail, the defendant made an affidavit, that the plaintiff was indebted to him in the ſum of two hundred pounds, whereas the plaintiff was not in fact indebted to the defendant in the ſum of two hundred pounds, nor in any other ſum of money; that upon this affidavit the plaintiff was arreſted, and for want of putting in ſpecial bail was confined in goal; and that after being ſome time confined, he was diſcharged without putting in ſpecial bail; becauſe he was not bound, either by the law of the land, or by the cuſtom of the court of *Newcaſtle*, to put in ſpecial bail.

Upon a demurrer to this declaration, the queſtion was, Whether it was neceſſary for the plaintiff to alledge, that the action in the court of *Newcaſtle* was determined in his favour, before the preſent action was brought?

It was holden, that this ought to have been alledged.

And by *Deniſon* J.—It is a ſettled point; that if an action be brought for maliciouſly proſecuting an indictment, the plaintiff muſt alledge, that he was acquitted before the action was brought.

It is alledged in the preſent caſe, that the plaintiff was diſcharged without putting in ſpecial bail: But it does not follow, that the demanding of ſpecial bail was malicious; for the

the diſcharge might be by reaſon of ſome defect in the affidavit for holding to ſpecial bail, and not for want of a ſufficient debt to hold thereto. In the caſe of *Skinner* v. *Gunton and Others*, 1 *Saund.* 228. it is ſaid; that although the want of alledging, in an action like the preſent, that the former action was determined in favour of the plaintiff, either by a non-ſuit, diſcontinuance or verdict, would be cured by a verdict, it is bad upon a demurrer. In the caſe of *Reynolds* v. *Reynolds*, *Mich.* 22. *G.* 2. in this court, the authority of the caſe of *Skinner* v. *Gunton and Others*, was recognized; and it was ſaid in the latter caſe, that actions for malicious proſecutions ought not to be encouraged.

Rex *verſ.* Davis.

UPON a motion in arreſt of judgment in an indictment, it appeared; that the defendant was an overſeer of the poor; and that the charge in the indictment was, that he refuſed to receive a *Pauper*, who was removed by an order of two juſtices of the peace.

An indictment will lie againſt an overſeer for not receiving a *Pauper*, removed by an order of two juſtices of the peace.

The rule was diſcharged.

And by *Ryder* Ch. J.—It has been ſaid; that as the offence of an overſeer of the poor, in not receiving a *Pauper* removed by an order of two juſtices of the peace, is a new offence created by the 3 & 4 *W.* & *M. c.* 11. an indictment will not lie, another remedy being given by that ſtatute; namely, " that " if any overſeer of the poor ſhall refuſe to " receive a perſon, removed by warrant of " two juſtices of the peace from one county, " city, or town corporate to another, he ſhall " forfeit the ſum of five pounds, to the uſe

" of the poor of the pariſh from which the " ſaid perſon was removed, to be levied by " diſtreſs and ſale of the offender's goods, by " warrant under the hand and ſeal of any " juſtice of the peace of the county, city or " town corporate, to which the ſaid perſon " was removed; and for want of ſufficient " diſtreſs, the ſaid juſtice ſhall commit the " offender to the common goal, there to re- " main without bail or mainprize for the " ſpace of forty days."

We are of opinion; that, as a power of removing a perſon likely to become chargeable to a pariſh is given to two juſtices of the peace, by the 13 & 14 *C.* 2. *c.* 12. the not receiving of a perſon, removed by an order of two juſtices of the peace, is an offence againſt that ſtatute, and conſequently an indictment will lie. But if this were a new offence, created by the 3 & 4 *W.* & *M.* *c.* 11. yet an indictment will, in our opinion lie, in caſe the removal was to a place within the juriſdiction of the juſtices by whom the order of removal was made, the remedy by the latter ſtatute being only given, where the removal was to a place out of their juriſdiction. It does not appear from the indictment in the preſent caſe, that the removal was to a place out of the juriſdiction of the juſtices by whom the order was made; and if intendment were neceſſary, the court would in ſupport of the verdict intend, that it was to a place within their juriſdiction.

Rex

Rex *verſ.* Read.

A judgment ſigned pending a judge's ſummons, ſet aſide.

UPON a rule to ſhew cauſe, why the judgment in an information in the nature of a *quo warranto* ſhould not be ſet aſide with coſts, for irregularity, it appeared; that a copy of the replication was delivered, during the laſt vacation after nine of the clock in an evening; that no rule to rejoin was given; that a ſummons, for the proſecutor's clerk in court to ſhew cauſe, why the defendant ſhould not have further time to rejoin, was iſſued by *Deniſon* J. that the clerks in court of both parties did attend upon this ſummons; that ſome doubt ariſing, as to the giving of further time to rejoin, *Deniſon* J. who was going out of town, recommended it to both the clerks in court to attend the chief juſtice, which both, as he apprehended, did conſent to do; and that before any thing further was done, the proſecutor's clerk in court ſigned judgment.

The rule was made abſolute.

And by the court—It has been ſaid; that the delivery of the copy of the replication after nine of the clock in an evening was irregular; and that a rule to rejoin ought to have been given: But, as it appears from the maſter's report, that, by the practice of the crown office, a copy of a replication may be delivered after nine of the clock in an evening; and that when a copy of a replication is delivered in the time of vacation, it is not neceſſary to give a rule to rejoin, there is no reaſon to ſet aſide the judgment on either of theſe accounts.

It

It has been ſaid; that it is not irregular to ſign judgment, pending the ſummons of a judge; and it is in the general true, that the ſummons of a judge does not ſtay any proceeding: Yet the judgment ought, in the preſent caſe, to be ſet aſide, and with coſts; becauſe, upon conſidering all the circumſtances of the caſe, we are of opinion, that the ſigning of it was exceedingly improper.

Ribout *verſ.* Wheeler.

Execution cannot be taken out, after the allowance of a writ of *error coram vobis*, without leave of the court.

UPON a rule to ſhew cauſe, why a writ of *Fieri Facias* ſhould not be ſet aſide, and why the money levied thereupon ſhould not be reſtored, it appeared; that a writ of *error coram vobis* had been brought upon a judgment and allowed; that the plaintiff's attorney had been ſerved with the notice of the allowance, before the writ of *Fieri Facias* was ſued out; that the writ of *error* was not determined; and that the writ of *Fieri Facias* was ſued out without leave of the court.

The rule was made abſolute.

And by *Deniſon* J. (*Ryder* Ch. J. and *Wright* J. being abſent)——Before a writ of *error coram vobis*, it not being a writ of *right*, is allowed; there muſt be an affidavit of ſome error in fact, by which, in caſe the fact to be aſſigned for error is true, the plaintiff's right of action will be deſtroyed. A writ of *error coram vobis* is not a *ſuperſedeas* in in itſelf: But although it be not, execution cannot be taken out upon the judgment whilſt it is depending without leave of the court. It would be very unreaſonable, that it ſhould be in the power of

of the plaintiff, to take out execution upon the judgment without leave of the court, whilſt a queſtion is depending concerning a fact, by which, if it be true, the plaintiff's right of action will be deſtroyed.

Rex *verſ.* Brookes.

UPON a rule to ſhew cauſe, why judgment ſhould not be arreſted in an indictment, the charge in the indictment appeared to be; that the defendant dug two gripps or ditches in a certain paſſage or common footway; one of which was in depth ſix feet, and in width twelve feet; the other in depth ſix feet, and in width thirteen feet; to the nuſance of all the king's ſubjects.

It is not always neceſſary to ſet out the length of the nuſance, in an indictment for a nuſance.

The rule was diſcharged.

And by *Deniſon* J. (*Ryder* Ch. J. and *Wright* J. being abſent)—It has been ſaid; that the paſſage or footway is not alledged to have been a paſſage or footway, from time whereof the memory of man is not to the contrary: But we are of opinion, that it was not neceſſary to alledge this; for a highway may have become ſo, by a dedication of a right of paſſage therein to the uſe of the publick, within time of memory; and it is certain, that many ſtreets in the city of *Weſtminſter* have become highways, within time of memory.

It has been ſaid; that the footway or paſſage is not alledged to be a common way for all the king's ſubjects; and that an indictment will not lie for a nuſance in a way, unleſs the way be common for all the king's ſubjects: But the gripps or ditches in the footway or paſſage

paſſage are alledged, to be to the nuſance of all the king's ſubjects; which in *Thrower's* caſe, 1 *Ventr.* 208. was holden to be a ſufficient allegation, that the way, wherein the nuſance was alledged to be, was a common way for all the king's ſubjects.

It was likewiſe ſaid; that the length of the nuſance is not ſet out; and it was added; that this ought always to be ſet out in an indictment for a nuſance in a way, for that otherwiſe the court, in caſe there be a conviction, cannot judge what fine ought to be ſet.

Deniſon J. inclined to be of opinion, that the length of the nuſance ought always to be ſet out in an indictment for a nuſance in a way; not for the ſake of enabling the court to ſet a proper fine; but that the defendant may the better know how to prepare for his defence.

Foſter J. inclined to be of opinion; that it is not always neceſſary to ſet out the length of the nuſance in an indictment for a nuſance in a way.

After taking time to conſider, the two juſtices concurred in opinion; that it was not in the preſent caſe neceſſary to ſet out the length of the nuſance.

And by *Deniſon* J.—The gripps or ditches might, in the preſent caſe, be dug quite acroſs the footway or paſſage; in which caſe the nuſance would entirely conſiſt in the depth and width of the gripps or ditches; and the court ought, after a verdict of guilty, to intend that this was the caſe.

Rex

Rex *verſ.* Burgeſs.

IN an indictment, for obſtructing a certain highway through *Richmond* Park, there was only one count, in which it was alledged, that all the king's ſubjects have a right of paſſing on foot, on horſeback, and in carriages, in and through the ſaid highway.

A defendant cannot be found guilty of obſtructing a footway, unleſs the obſtruction of a footway only be charged in the indictment.

Upon the trial at bar of an iſſue joined upon the plea of not guilty, a right of paſſing on foot in and through the ſaid highway was proved: But as there was not a count in the indictment for a footway only, the direction of the court to the jury was, that they ought to find the defendant not guilty, and a verdict of not guilty was found.

Rex *verſ.* Bennet.

UPON a rule to ſhew cauſe why the defendant, who was an attorney, ſhould not pay his client the ſum of nineteen pounds, together with the coſts of this application, it appeared; that *J. S.* was arreſted at the ſuit of his client for the ſum of nineteen pounds, and was in cuſtody; that the defendant had taken a ſecurity from *J. S.* to his client for that ſum, and diſcharged him out of cuſtody; and that the defendant, at the time of taking the ſecurity, knew it to be worth nothing.

An attorney compelled to pay the money due upon a bad ſecurity taken by him for his client.

The rule was made abſolute.

And by *Ryder* Ch. J.—It is highly reaſonable, that an attorney who has miſbehaved in ſo groſs a manner, ſhould make a ſatisfaction to his client.

Rex *verſ.* The Inhabitants of Yarmouth.

It is not neceſſary that an indenture, if the money given with an apprentice was only ſixpence, ſhould be ſtamped.

IN an order of ſeſſions it was ſtated; that the *Pauper* ſerved an apprenticeſhip in the pariſh of *Yarmouth*, under an indenture in which the conſideration money mentioned was ſixpence; and that the indenture was not ſtamped as is directed by the 8 *Ann. c.* 9,

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Yarmouth?*

It was holden that he did.

And by *Ryder* Ch. J.——As the duty due upon the conſideration money mentioned in this indenture, was only three-fifths of a farthing there is no coin ſmall enough to pay it in; and conſequently the indenture could not be ſtamped as is directed by the 8 *Ann. c.* 9. In the caſe of *Baxter* v. *Fairlam*, *Eaſt.* 19 *G.* 2. in this court, it was holden, than an indenture of apprenticeſhip, in which the money given with the apprentice appeared to be ſixpence, was not void for want of being ſtamped as is directed by the 8 *Ann. c.* 9. for that every ſuch caſe falls under the maxim, *de minimis non curat Lex.*

Rex *verſ.* The Inhabitants of Lechlade.

A ſon, been in a pariſh after his father came to reſide under a certificate cannot gain a ſettlement by a hiring and ſervice in that pariſh.

IN an order of ſeſſions it was ſtated; that the *Pauper* was the ſon of a man, who together with his wife came to reſide under a certificate in the pariſh of *Lechlade;* that he was born in that pariſh after his father came to reſide under the certificate; and that he was hired as a ſervant for a year in that pariſh; and that he ſerved the year.

The queſtion was, Whether the *Pauper* gained a ſettlement in the pariſh of *Lechlade?*

It was holden that he did not.

And by *Ryder* Ch. J.—It has been ſaid; that the 9 and 10 *W.* 3. *c.* 11. by which it is enacted, "that no perſon whatſoever, who "ſhall come into any pariſh by a certificate, "ſhall be adjudged by any act whatſoever to "have procured a legal ſettlement, unleſs he "ſhall, *bona fide*, tak ea tenement of the va-"lue of ten pounds, or ſhall execute ſome "annual office in ſuch pariſh, being legally "placed in ſuch office," does not extend to the preſent caſe; becauſe the *Pauper* did not come into the pariſh of *Lechlade* by a certificate. If the preſent were a new caſe, we ſhould be of opinion; that as the *Pauper* was born whilſt his father reſided in the pariſh of *Lechlade* under a certificate, he is within the meaning of that ſtatute, although he be not within the letter: But it is not a new caſe. In the caſe of *Rex* v. *The Inhabitants of Sherborne, Eaſt.* 15 *G.* 2. it was holden; that the ſon of a certificate man, born in a pariſh whilſt his father reſided therein under a certificate, did not gain a ſettlement by a hiring for a year, and ſerving the year in that pariſh.

Tourville *verſ.* Pony.

A new replication may be after two terms.

UPON a rule to ſhew cauſe, why the plaintiff ſhould not withdraw his replication and reply again, it appeared; that the replication intended to be withdrawn was of *Eaſter* term laſt; and that iſſue was joined in the cauſe.

The rule was made abſolute.

And by the court—It has been ſaid; that a new count cannot be added after two terms; and it is inferred, that therefore a new replication ought not to be allowed after two terms: But there is a wide difference betwixt the two things; adding a new count is for a new cauſe of action; whereas a new replication is in the nature of an amendment, for the making of which no time is limited.

Mordecai *verſ.* Solomon.

Coſts ordered to be paid by the attorney in a cauſe.

UPON a rule to ſhew cauſe, why the plaintiff's attorney ſhould not pay the coſts of a judgment of *Nonproſs*, and the coſts of the preſent application, it appeared; that the plaintiff's brother had frequently employed the attorney, and always paid him well; that the plaintiff's brother had undertaken to pay the attorney in this cauſe, but that he did not bring ſome money applied for by the attorney; that judgment of *Nonproſs* was ſigned for making up the iſſue; and that the plaintiff was in priſon for not paying the coſts of the judgment.

The

The rule was made abſolute.

And by the court—When an attorney has commenced a ſuit upon the credit of a client, he ought to proceed in it, although the client do not bring him money every time he applies for it.

Beſides making the rule abſolute, it was thrown out by the court, that it would be proper for the attorney to take care, that the plaintiff ſhould be immediately diſcharged out of priſon.

Hilary

Hilary Term,

28 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter,
Sir J. Eardley Wilmot, } *Juſtices.*

MEMORANDUM. Towards the latter end of this term, Sir *John Eardley Wilmot* took his ſeat as one of the juſtices of this court, in the room of Sir *Martin Wright*, who had ſurrendered his patent.

Rex *verſ.* Stirling.

The return to a *mandamus* holden to be bad, by reaſon of its being uncertain.

THE return to a *mandamus* directed to the defendant, for reſtoring *Joſeph Hall* to the office of pariſh clerk, was; that the office of pariſh clerk being at a certain time vacant, and the defendant, to whom it belonged as vicar to appoint thereto, not being at that time able to find a perſon proper for the

the office, did appoint *Joſeph Hall* thereto, until he ſhould be able to find a proper perſon; that *Hall* was no otherwiſe appointed; that he was never admitted, or licenſed, as pariſh clerk by the ordinary; that the defendant having ſince found a perſon proper for the office, he had removed *Hall*, and appointed that perſon thereto; and that therefore he could not reſtore *Hall* to the office of pariſh clerk.

The return was holden to be bad; and a peremptory *mandamus* was awarded.

And by *Ryder* Ch. J.—As the office of pariſh clerk is *prima facie* an office of life, *Hall* did by the appointment acquire a freehold in the office, unleſs the defendant had a power of appointing thereto during pleaſure; and it does not appear, that the defendant had ſuch a power. It is the duty of the perſon, to whom a *mandamus* is directed to obey the writ, or to return a cauſe for not obeying it in ſuch preciſe terms, that the truth thereof may be tried in an action for a falſe return; or that, if the truth of the cauſe returned be admitted, the court may be able to judge of the goodneſs thereof: Whereas the cauſe returned in the preſent caſe is ſo uncertain, that the truth thereof cannot be tried in an action for a falſe return; nor can the court, in caſe the cauſe returned be true, judge of its goodneſs.

Rex

Rex *verſ.* Hord.

A conviction for a forcible entry quaſhed.

UPON a rule to ſhew cauſe, why a conviction for a forcible entry ſhould not be quaſhed, it appeared; that a fine was ſet upon the perſon convicted: But there was no adjudication, that he ſhall be committed until the fine is paid.

The rule was made abſolute.

And by the court—There ought to be an adjudication, that the perſon, upon whom a fine is in ſuch caſe ſet, ſhall be committed until the fine is paid.

Pawſon *verſ.* Scott.

The ordinary may grant a faculty for erecting a gallery in a chapel.

UPON a rule to ſhew cauſe, why a writ of *prohibition* ſhould not be awarded to an eccleſiaſtical court, it appeared; that under the 2 *G.* 2. *c.* 16. which is declared to be a public ſtatute, a chapel had been built in the town of *Leeds;* that a power was given by that ſtatute to the curate of the chapel, of ſelling the inheritance in the pews in the chapel; that *Pawſon* had purchaſed one of the pews of *Scott* the curate; that *Scott*, upon a ſuggeſtion that more pews were wanted in the chapel, had inſtituted a ſuit in the eccleſiaſtical court for a faculty to erect a gallery; that the granting of the faculty was oppoſed by *Pawſon*, who ſuggeſted, that the erection of the gallery would be detrimental to his pew, by preventing, in ſome degree, the acceſs of light and air thereto; and that there was a ſentence for the faculty.

One

One queſtion was, Whether it be not too late to apply in any caſe, after the ſentence of an eccleſiaſtical court, for a prohibition?

It was holden that it is not.

And by *Ryder* Ch. J.—The ſentence is, in almoſt all caſes, the grievance complained of; and it is not in every caſe too late to apply for a prohibition after a ſentence. In the caſe of *Gardner* v. *Booth*, *Salk.* 548. it is laid down; that a prohibition to an eccleſiaſtical court may be applied for after a ſentence, in any caſe wherein the eccleſiaſtical court had not juriſdiction.

Another queſtion was, Whether it be proper to award a prohibition in the preſent caſe?

It was holden that it is not.

And by *Ryder* Ch. J.——It has been ſaid; that a right to a freehold is in queſtion, and conſequently that the eccleſiaſtical court had not juriſdiction: But this is not the caſe; for the queſtion is not as to the right of *Pawſon* to a freehold in the pew, it being only as to the extent of that right. The freehold of a church is always in the parſon, and the freehold of a church-yard is always in the churchwardens of the pariſh; and yet the ordinary has a juriſdiction as to all erections and ornaments in the church; and in the caſe of *Quilter* v. *Newton*, *Carth.* 152. it is laid down, that a nuſance in the church-yard is of eccleſiaſtical cognizance. The maxim, *cujus eſt ſolum ejus eſt uſque ad Cœlum*, does not apply to the caſe of a freehold in a pew; in as much as, the right of freehold in a pew does only extend to ſitting and hearing divine ſervice therein. The owner of a pew cannot either dig a vault under it, or erect any thing over it, without a faculty from the ordinary.

The principal queſtion, namely, whether it be neceſſary to erect a gallery in this chapel, is proper for the determination of an eccleſiaſtical court; it being the province of the ordinary, to regulate every thing which relates to the exerciſe of divine ſervice in a church or chapel; and there is no inſtance of a prohibition being awarded to an eccleſiaſtical court, in a caſe like the preſent.

It is not a good objection to the erecting of a gallery in this chapel, that the pew of *Pawſon* will not be ſo airy, or ſo light as it was before; for it is utterly impoſſible to erect a gallery in any church or chapel, by which the acceſs of light and air to one or more pews will not be in ſome degree prevented: But an inconveniency to one or more perſons muſt, in ſuch caſe, be ſubmitted to, that many perſons may have an opportunity of attending divine ſervice.

It has been ſaid; that the right of *Pawſon* to the pew in this chapel, it being a right of inheritance purchaſed under an act of parliament, is very different from the right which perſons in the general have to pews in churches and chapels: But all the rights of the ordinary are expreſsly ſaved by the act; and the right of granting a faculty for erecting a gallery is one of thoſe rights.

It has been ſaid; that an action upon the caſe will lie in a temporal court for the nuſance to *Pawſon's* pew, by erecting the gallery; and it is inferred, that a prohibition ought to be awarded to the eccleſiaſtical court, leſt the judgments of the two courts ſhould be different: But there is no inſtance of ſuch an action's having been brought. It ought likewiſe

likewiſe to be remembered, that there are divers caſes, wherein temporal and eccleſiaſtical courts have a concurrent juriſdiction; and it is probable, that the ſentence of an eccleſiaſtical court may, in every caſe wherein the two courts have a concurrent juriſdiction, be pleaded to an action in a temporal court.

Portman *verſ.* Okeden.

In an action for a penalty, part of which is given to the poor of a pariſh, an inhabitant of the pariſh rated to the poor is not a competent witneſs.

IN a caſe reſerved, in an action *qui tam*, it was ſtated; that the action was for the penalty of five pounds, given by one of the ſtatutes made for the preſervation of the game; that a moiety of the penalty was given to the poor of the pariſh wherein the offence was committed; and that at the trial of the cauſe it was ruled; that an inhabitant of the pariſh wherein the offence was committed, who was aſſeſſed to the poor's rate, was not a competent witneſs for the plaintiff.

The queſtion was, Whether the inhabitant was a competent witneſs for the plaintiff?

It was holden that he was not.

And by *Deniſon* J. (the Ch. J. and *Wright* J. being abſent)—It has been ſaid; that the part of the penalty given to the poor of the pariſh ought to be conſidered as a bounty to the poor: But there is no ground for ſo conſidering it; for that part of the penalty is to be paid to, or to be diſtrained for by the overſeers of the poor, and it is always brought to the account of the pariſh.

It has been ſaid; that in the caſe of *Rex* v. *Wyatt*, *Paſch.* 13 *G.* 2. it was holden; that an inhabitant of a pariſh was a competent witneſs for the pariſh: But it did not in that

caſe appear, that the inhabitant was aſſeſſed to the poor's rate of the pariſh; and as that did not appear, the court would not intend it.

No caſe has been cited, in which it was holden; that a perſon, who is aſſeſſed to the poor's rate of a pariſh, is, in the general, a competent witneſs for the pariſh; and it may fairly be inferred from the 3 & 4 *W.* & *M.* *c.* 11. whereby it is provided, that a perſon who is aſſeſſed to a poor's rate of a pariſh may, in a certain caſe, be a witneſs; that ſuch a perſon is not in the general a competent witneſs for the pariſh.

Norton *verſ.* Voules.

If an attorney is plaintiff, the *Venue* may be always laid in the county of *Middleſex.*

UPON a rule to ſhew cauſe, why a rule, which had been made for changing the *venue* from the county of *Middleſex* to the county of *Berkſhire*, ſhould not be diſcharged, it appeared; that the rule for changing the *venue* had been made upon the common affidavit; and that the plaintiff was an attorney of this court.

The rule was made abſolute.

And by the court——It is a part of the privilege of an attorney of this court, that he may lay the *venue* in an action brought by himſelf in the county of *Middleſex;* and the court will not deprive him of this part of the privilege, unleſs there be ſome very particular and ſtrong reaſon for ſo doing.

Arnold

Arnold *verſ.* Squire.

In what manner the notice of executing a writ of *enquiry* muſt be given.

UPON a rule to ſhew cauſe, why the inquiſition upon a writ of *enquiry* ſhould not be ſet aſide, it appeared; that the ſign of the houſe at which the writ was to be executed was not mentioned in the notice of executing it; and that it was not expreſſed in the notice, that the writ was to be executed between two certain hours.

The rule was made abſolute.

And by the court—It is neceſſary that the ſign of the houſe, at which a writ of *enquiry* is to be executed, ſhould be mentioned in the notice of executing it, and that it ſhould be expreſſed in the notice, that the writ will be executed between two certain hours.

Moir *verſ.* Munday.

A cuſtom to diſtrain various goods, which are of a great value, for a ſmall penalty is bad. An action of *treſpaſs* lies for making a diſtreſs, if there was no right of diſtraining.

IN a caſe reſerved, in an action of *treſpaſs*, it was ſtated; that by one cuſtom of the city of *Oxford*, if a perſon, who is not a freeman of the ſaid city, expoſe goods to ſale in the ſaid city, except in fairs or markets, he is liable to the payment of ſix ſhillings and eight pence to the two bailiffs of the ſaid city, by way of penalty; that by another cuſtom of the ſaid city, in caſe the ſaid penalty be incurred, and be not paid upon demand, all the goods expoſed to ſale may be diſtrained, and detained until it is paid; that the plaintiff, not being free of the ſaid city, did expoſe goods to ſale contrary to the ſaid cuſtom; that a demand was made of the ſaid penalty; that

that upon the refuſal of the plaintiff to pay the ſame, all the goods expoſed to ſale were diſtrained by the defendant, who was at that time one of the bailiffs of the ſaid city; and that the value of the goods diſtrained, which were of various ſorts, was one hundred pounds.

The queſtion was, Whether the plaintiff be entitled to recover?

It was holden, upon great conſideration, that he is.

And by *Ryder* Ch. J.—The general queſtion, ſubmitted to the court by this caſe, namely, whether the plaintiff be entitled to recover, depends upon divers other queſtions.

One of theſe is, whether a cuſtom of a city, by which every perſon, not being a freeman of the city, who expoſes goods to ſale in the city, except in fairs or markets, is liable to a penalty, be good?

We are of opinion, that ſuch a cuſtom is good, provided the penalty be reaſonable; and that the penalty in the preſent caſe is reaſonable. It is laid down in *Waganor*'s caſe, 8 *Rep.* 126. that a cuſtom to reſtrain a man from exerciſing his trade in a particular place is good.

Another of theſe queſtions is, whether a cuſtom of a city to exclude a foreigner from expoſing goods to ſale in the city, which does not except victuals, be good?

We are of opinion, that it is not neceſſary to the validity of ſuch a cuſtom, that victuals ſhould be excepted. In *Waganor*'s caſe the ſale of victuals was not excepted, and yet ſuch a cuſtom was holden to be good.

Another

Another of theſe queſtions is, whether a cuſtom to diſtrain for a penalty due by cuſtom be good?

We are of opinion, that ſuch a cuſtom is good. It is laid down in *Waganor*'s caſe, and has been holden in divers caſes; that a power of diſtraining for a penalty due by cuſtom may be given by a by-law; and it ſeems to be equally reaſonable to hold, that a power of diſtraining for a penalty due by cuſtom may be given by a cuſtom, as it is to hold, that a power diſtraining for ſuch a penalty may be given by a by-law.

Another of theſe queſtions is, whether, as the penalty is to be paid to the two bailiffs of the city of *Oxford*, one of them could diſtrain for it?

We are of opinion, that as it does not appear, that the penalty is to be appropriated to the uſe of the corporation, it muſt be intended, that it is to be paid to the bailiffs for their own uſe; and if this be ſo, either of them might diſtrain for it.

Another of theſe queſtions is, whether a cuſtom, to diſtrain all the goods expoſed to ſale for the penalty of ſix ſhillings and eight pence, be good?

We are of opinion, that ſuch a cuſtom is not good. If the cuſtom had been, to diſtrain ſuch of the goods expoſed to ſale as ſhall be ſufficient to ſatisfy the penalty, it would have been good; and if only one thing had been expoſed to ſale, this, although it had been a diamond worth a thouſand pounds, might have been diſtrained for the penalty: But a cuſtom to diſtrain all the goods expoſed to ſale, although they are of various ſorts and of great value, for ſo very ſmall a penalty, is quite unreaſonable. In *Godfrey*'s caſe, 11 *Rep.*

Rep. 44. it is ſaid; that *exceſſus in re qualibet jure reprobatur communi.* In the caſe of *Hargrave* v. *Wood*, 2 *Lutw.* 1457. it is laid down; that it is unlawful to attach various goods, which are of great value, for a ſmall debt. It has been ſaid; that a carrier may detain all the goods delivered to him, for a ſmall ſum due for the carriage of the goods: But there is wide difference betwixt a power of detaining the goods which are in a man's poſſeſſion, upon which he has a lien, and a power of diſtraining goods which are not in a man's poſſeſſion. The power of diſtraining, given by the cuſtom, has been compared to the power of diſtraining all the beaſts which are *damage feaſant*, although very little damage has been done: But the caſes are by no means ſimilar. It is always neceſſary, that all the beaſts which are *damage feaſant* ſhould be diſtrained, in order to prevent a continuance of the injury: But, if a part of the goods expoſed to ſale are ſufficient to ſatisfy a penalty, it never can be neceſſary to diſtrain all the goods for the penalty.

The laſt of theſe queſtions is, whether, although the plaintiff have a right of action, he can recover in the preſent action?

We are of opinion that he is entitled to recover. It has been ſaid; that in the caſe of *Lynne* v. *Moody*, *Mich.* 3 *G.* 2. in this court, which was a writ of *error* brought upon a judgment of the court of common pleas, it was holden; that an action of *treſpaſs* does not lie for an exceſſive diſtreſs, the remedy being by an action upon the ſtatute of *Marlbridge*: But that caſe was by no means like the preſent. In that caſe, which was a diſtreſs for rent in arrear, there was a right to diſtrain; and as nothing was done after

after the diſtreſs, to make the diſtraining a *treſpaſs ab Initio*, there was in fact no treſpaſs: But if our opinion be well founded, that the cuſtom to diſtrain all the goods expoſed to ſale, although they are of various ſorts and of great value, upon which alone the right to diſtrain in the preſent caſe could be grounded, is not good; the defendant had not any right to diſtrain; and there is not the leaſt room for doubt, that, if a diſtreſs be made by a perſon not having a right to diſtrain, an action of treſpaſs will lie.

Heſketh *verſ.* Gray.

If an obligor undertake for the act of a ſtranger, he muſt procure the act to be done.

AN action of debt being brought upon a bond in the penalty of five thouſand pounds, and *Oyer* being prayed of the bond, it appeared from a recital therein; that *Robert Heſketh*, the plaintiff, had preſented *John Gray*, the defendant, to the vicarage of *Steyning* in the county of *Suſſex*; and that it was agreed betwixt them, that the ſaid *John* ſhould, within three months after the expiration of ſix years, to commence from the day of the date of the bond, at the requeſt of the ſaid *Robert*, his heirs, executors, adminiſtrators or aſſigns, reſign and deliver up the ſaid vicarage into the hands of the proper ordinary, ſo that it may become vacant, and the ſaid *Robert*, his heirs, executors, adminiſtrators or aſſigns, may preſent anew. It likewiſe appeared; that the condition of the bond was; that if the ſaid *John* ſhall, within three months after the expiration of ſix years, to commence from the day of the date of the bond, at the requeſt of the ſaid *Robert*, his heirs, executors, adminiſtrators or aſſigns, reſign and deliver up the ſaid vicarage into the hands of the

proper ordinary, whereby it may become vacant, and the ſaid *Robert*, his heirs, executors, adminiſtrators or aſſigns, may preſent anew, then the obligation to be void.

The defendant pleaded; that he did, within three months after the expiration of the ſix years mentioned in the condition of the bond, at the requeſt of the ſaid *Robert*, offer to reſign and deliver up into the hands of *Matthias*, Lord Biſhop of *Chicheſter*, who was the proper ordinary, the ſaid vicarage, for the ſaid ordinary to accept the ſame, whereby the ſaid vicarage might become vacant, and the ſaid *Robert* might preſent anew; and that the ſaid ordinary did then refuſe, and from thenceforth hitherto hath refuſed to accept ſuch reſignation.

Upon a demurrer to this plea, it was holden to be bad; becauſe it is not therein averred, that the biſhop accepted the reſignation.

And by *Ryder* Ch. J.—The defendant, by undertaking to reſign, ſo that the vicarage may become vacant, and the plaintiff may preſent anew, has undertaken for the biſhop's acceptance of a reſignation; which, according to what is laid down in *Fane's* caſe, *Cro. Jac.* 198. is neceſſary to the completion of a reſignation.

Several caſes have been cited, in which it has been holden; that if a third perſon, who is a truſtee for the obligee, refuſe to do an act, for the doing of which the obligor has undertaken, the penalty of the bond is ſaved: And in order to bring the preſent caſe within the reaſon of thoſe caſes, it has been ſaid; that the biſhop is to be conſidered as a truſtee for the obligee. If the biſhop were a truſtee for the obligee, it would be in the obligee's power to compel him to accept a reſignation; it

it being always in the power of a *ceſtui que truſt* to compel his truſtee to execute the truſt: But it is not, in the preſent caſe, in the power of the obligee to do this; and conſequently, the biſhop is not to be conſidered as a truſtee for the obligee.

We are of opinion, that the biſhop is, in the preſent caſe, a ſtranger to the obligee; and if this be ſo, it was incumbent upon the obligor to procure his acceptance of a reſignation. In 1 *Roll. Abr.* 452. 5 *Rep.* 23. and 1 *Saund.* 216. it is laid down; that if the obligor undertake for the act of a third perſon, who is a ſtranger to the obligee, it is incumbent upon the obligor to procure the act to be done; unleſs there were at the time of entering into the bond an impoſſibility of doing the act, or unleſs the doing thereof have been ſince rendered impoſſible by the act of God, or by the act of law.

Maxwell *verſ.* Sharp.

A verdict, for the finding of which there was ſufficient evidence, is good, altho' improper evidence was admitted.

UPON a writ of *error*, brought upon a judgment of the Court of King's Bench in *Ireland*; by which a judgment of the court of common pleas in *Ireland* was affirmed, it appeared; that *Sharp* the plaintiff in the original action, which was an action of *Aſſumpſit*, had alledged in his declaration; that by an agreement in writing, entered into betwixt him and *Maxwell* the defendant in that action, it was agreed; that *Sharp* ſhould transfer to *Maxwell* two thouſand pounds, *London* aſſurance ſtock, at the day of the next opening of the transfer books of the ſaid ſtock; and that *Maxwell* ſhould pay the ſum of two

thouſand four hundred and ſixty pounds to *Sharp* for the ſaid ſtock; that at the day of the next opening of the ſaid books *Sharp* was ready, and continued to be ready until the ſhutting of the ſaid books that day, to transfer the ſaid ſtock to *Maxwell*; that neither *Maxwell*, nor any perſon on his behalf, came to accept the ſaid ſtock; and that *Maxwell* has not ſince paid the ſum of two thouſand four hundred and ſixty pounds to *Sharp*.

It appeared from a bill of exception; that *Helbut*, a broker, gave evidence, that upon the 19th day of *Auguſt* 1720, he bought on the account of *Sharp* and *Abbot* two thouſand pounds *London* aſſurance ſtock, which was transferred to *Sharp* only; that the ſame day a parol agreement was made, betwixt *Sharp* and *Abbot*, and *Maxwell*, for the ſale of the ſtock to *Maxwell*; that a note in writing was given by *Sharp* to *Maxwell*, by which he agreed to transfer the ſtock to *Maxwell*, at the day of the next opening of the transfer books of the ſtock; that another note in writing was given by *Maxwell* to *Sharp*, whereby he agreed to accept the ſtock at the day of the next opening of the books, and to pay the ſum of two thouſand four hundred and ſixty pounds to *Sharp* for the ſame; and that *Sharp* and *Abbot* ſuſtained a conſiderable loſs, by being obliged to borrow money at high intereſt to pay for the ſtock. It did likewiſe appear from the bill of exceptions; that in the regiſter of the contract for the ſale of the ſtock, the contract was mentioned to be betwixt *Sharp* and *Abbot*, and *Maxwell*; that the regiſter was not ſigned by any of the parties to the contract; and that the note from *Sharp* to *Maxwell*, and the note from *Maxwell* to *Sharp*, were ſet forth at large in the regiſter.

The

The judgment was upon great conſideration affirmed.

And by *Ryder* Ch. J.—It has been ſaid; that the declaration in the original action is bad; becauſe it is not therein alledged, that there was an actual transfer of the ſtock. This objection to the declaration is founded upon a ſuppoſition, that the transfer of the ſtock was a condition precedent: But we are of opinion; that there were, in the preſent caſe, two mutual and independent contracts, for the breach of either of which an action would lie. If the transfer of the ſtock were, in the preſent caſe, a condition precedent, the declaration would nevertheleſs be good; for as *Sharp* was ready to transfer the ſtock, he is, agreeably to what is laid down in the caſe of *Lancaſhire* v. *Killingworth*, Lord *Raym.* 686. as well entitled to the money agreed for, as if it had been actually transferred.

It has been ſaid; that the evidence, it being of an agreement betwixt *Sharp*, and *Abbot*, and *Maxwell*, did not maintain the declaration in the original action, in which an agreement betwixt *Sharp* and *Maxwell* is alledged. If the parol agreement, of which evidence was given, were inconſiſtent with the written agreement contained in the note from *Maxwell* to *Sharp*, that evidence ought not to have been admitted; it being a ſettled point, that evidence of a parol agreement, which is inconſiſtent with a written agreement, ought not to be admitted: But we are of opinion, that the parol agreement, of which evidence was given, is by no means inconſiſtent with the written agreement. Inſtead of being inconſiſtent therewith, the parol agreement is an agreement between *Sharp* and *Maxwell*: For as the legal intereſt in the ſtock was in

Sharp

Sharp alone, he only could, with propriety, agree for the ſale thereof; and conſequently, the participation of *Abbot* in an agreement betwixt *Sharp* and *Maxwell*, notwithſtanding he had an equitable intereſt in a moiety of the ſtock, could only amount to a confirmation of the agreement.

It has been ſaid; that the regiſter of the contract for the ſale of the ſtock was not ſigned by the parties thereto, as is by the 7 *G.* 1. *ſtat.* 1. *c.* 1. required: But where the whole contract for the ſale of ſtock is regiſtered, as was done in the preſent caſe, it is not required by that ſtatute, that the regiſter ſhould be ſigned by the parties thereto; the ſigning of the regiſter being only required, where an abſtract or a memorial of the contract is regiſtered. In the caſe of *Aſhley* v. *Kinaſton*, *Mich.* 11 *G.* 1. it was ruled; that where the whole contract for the ſale of ſtock is regiſtered, it is not neceſſary that the regiſter ſhould be ſigned by the parties thereto.

It has been ſaid; that the verdict in the original action is bad; becauſe evidence was admitted of a loſs ſuſtained by *Abbot* as well as *Sharp*, by the borrowing of money at high intereſt to pay for the ſtock. But, as there was ſufficient evidence to warrant the finding of the verdict as it is found, and it does not appear, that any regard was paid by the jurors to this evidence, the court will not intend that any regard was paid. The court will rather intend, in ſupport of the verdict, that the jurors rejected this evidence as ſuperfluous.

A writ of *error* was brought upon the judgment of this court in the Houſe of Lords; in which there was judgment of *nonproſs*.

Kearſe

Kearle qui tam *verſ.* Boulter.

A poulterer is not liable to a penalty, for having a hare in his cuſtody.

IN an action, brought for the penalty given by the 5 *Ann. c.* 14. it was found by a ſpecial verdict; that the defendant carried on the trade of a poulterer; that for the carrying on of this trade he kept an open ſhop, wherein he bought and ſold geeſe, chickens, and other poultry; that he had a hare in his cuſtody, and did ſell the hare to *J. S.* for four ſhillings; and that at the time of having the hare in his cuſtody, and of ſelling it, he was ſeiſed in fee of an eſtate of one hundred pounds a year.

The queſtion was, Whether the plaintiff ought to recover?

It was holden upon great conſideration that he ought not.

And by *Ryder* Ch. J.—By that clauſe of the 5 *Ann. c.* 14. upon which the preſent action is founded, it is enacted, "that if any higler, "chapman, carrier, inn-keeper, victualler "or alehouſe-keeper, ſhall have in his cuſtody "or poſſeſſion any hare, pheaſant, partridge, "moor, heath game or grouſe, or ſhall buy, "ſell, or offer to ſale any hare, pheaſant, par-"tridge, moor, heath game or grouſe, eve-"ry ſuch higler, chapman, inn-keeper, vic-"tualler, alehouſe-keeper, or carrier, unleſs "ſuch game in the hands of ſuch carrier be "ſent him by a perſon qualified to kill the "game, ſhall forfeit for every hare, pheaſant, "partridge,

" partridge, moor, heath game or grouſe, the " ſum of five pounds."

It has been ſaid; that every perſon, who buys and ſells goods in an open ſhop, is a trader; and that every trader is a chapman; for that the *German* word *copeman*, from which the *Engliſh* word *chapman* is derived, does ſignify a trader: But we are of opinion; that although the defendant be a chapman in the large ſenſe of the word, he is not a chapman within the meaning of the 5 *Ann. c.* 14. In order to come at the meaning of a word contained in a ſtatute, the miſchief intended to be remedied by the ſtatute ought to be taken in conſideration. It appears from the preamble of the 5 *Ann. c.* 14. that the miſchief, intended to be thereby remedied, was the buying or receiving of game from looſe idle perſons. In order to remedy this miſchief, innkeepers, victuallers and alehouſe-keepers are prohibited from having game in their cuſtody or poſſeſſion; becauſe it is probable, that theſe perſons will frequently buy or receive game from looſe idle perſons, in order to have money ſpent at the eating thereof in their houſes. Higlers and carriers are likewiſe prohibited from having game in their cuſtody or poſſeſſion; becauſe it is probable, that theſe perſons will frequently buy or receive game from looſe idle perſons in one place, in order to ſell it at another. Chapmen are likewiſe prohibited from having game in their cuſtody or poſſeſſion: But the ſound conſtruction ſeems to be, that the word *chapman* in this ſtatute, and the rather, becauſe it is inſerted betwixt the words *higler* and *carrier*, does only mean a trader who trades from place to place. It being as probable, that ſuch traders will frequently buy or receive game from looſe idle perſons

perſons in one place, in order to ſell it at another, as that higlers and carriers will. It was reaſonable to prohibit ſuch traders from having game in their poſſeſſion: But it never could be the intention of the legiſlature, to prohibit every trader from having game in his cuſtody or poſſeſſion.

It has been ſaid; that, although the opinion of the court ſhall be, that the defendant is a chapman within the meaning of the 5 *Ann. c.* 14. yet the plaintiff ought not to have judgment; becauſe the jurors, whoſe province it was to determine, whether the defendant be ſuch a chapman, have only found facts, and have not found expreſsly that he is. But as the queſtion, whether the defendant be a chapman within the meaning of that ſtatute, does in a great meaſure depend upon the conſtruction of the ſtatute, we are of opinion; that it is a queſtion proper for the determination of the court; and that the facts found by the verdict, are ſufficient to enable the court to determine the queſtion. In the caſe of *Dodſworth* v. *Anderſon*, 2 *Jo.* 142. it was holden; that if the proper facts are found by a verdict, it is the province of the court to determine, whether a perſon be a bankrupt within the meaning of any ſtatute.

It was ſaid; that although the opinion of the court ſhall be, that the defendant is a chapman within the meaning of the 5 *Ann. c.* 14. and likewiſe, that the queſtion, whether the defendant be ſuch a chapman, is proper for the determination of the court, yet the plaintiff ought not to have judgment: Becauſe it is found by the verdict, that the defendant, at the time of having a hare in his cuſtody, and of ſelling the hare, was ſeiſed in fee of an eſtate of one hundred pounds a year;

and it was inferred; that it would be ſtrange to hold, that a perſon, who is by law qualified to kill all kinds of game, is liable to a penalty for having a hare in his cuſtody, or for ſelling a hare.

No opinion was given by the court upon this point.

Kennon *verſ.* Owen.

If there be manifeſt intention to deviſe an eſtate in fee, the conſtruction ought to be, that ſuch an eſtate is deviſed.

IN a caſe referred, in an action of ejectment, it was ſtated; that *Thomas Fiſher* being ſeiſed in fee of an eſtate, part of which was copyhold, in the pariſh of *Barſton*, he ſurrendered the copyhold part to the uſe of his will; that by a will made afterwards, he deviſed all his freehold and copyhold lands in the pariſh of *Barſton* to *William Fiſher*, his brother, for and during the term of his life; that after this deviſe, he by the ſame will bequeathed divers legacies, to the amount of one hundred and fifty pounds, and then added theſe words, "after the deceaſe of myſelf "and brother, and all my legacies are paid, "I do appoint my nephew *Abraham Fiſher*, "to be the executor of all my real and per- "ſonal eſtate whatſoever;" that the teſtator and *William* the brother are both dead; and that the teſtator's perſonal eſtate did not amount to more than eight pounds.

The queſtion was, Whether *William* the executor, does take an eſtate in fee in the teſtator's real eſtate under this will?

It was holden that he does.

And by *Ryder* Ch. J.—Such a conſtruction ought, if poſſible, to be put upon the words of a will, that the intention of the teſtator, manifeſtly

manifeſtly appearing therein, may be anſwered. It does appear manifeſtly in this will to have been the teſtator's intention, that the legacies bequeathed by him ſhould be paid by *Abraham* the executor. This intention, as the legacies amounted to one hundred and fifty pounds, and his perſonal eſtate to only eight pounds, cannot be anſwered; unleſs the conſtruction of the will be, that *Abraham* the executor takes an eſtate in fee in the teſtator's real eſtate.

It has been ſaid; that the copyhold part of the teſtator's eſtate cannot paſs under this will; becauſe it is not expreſsly mentioned therein: But if there have been a ſurrender of a copyhold eſtate, to the uſe of the ſurrenderor's will, the eſtate will paſs by any words in the will of the ſurrenderor, which amount to an appointment under the ſurrender; and we are of opinion, that the following words in this will, "I do appoint my nephew "*Abraham Fiſher*, to be the executor of all "my real eſtate whatſoever," do amount to an appointment under the ſurrender of the copyhold part of the teſtator's eſtate to the uſe of his will.

Rex *verſ.* Tew and Soame.

THE defendants, who had been found guilty upon an indictment, being brought up for judgment, it appeared; that the indictment was for an aſſault and battery; and that the expence of the proſecution amounted to near two hundred pounds.

As the defendants would not conſent to go before the maſter, the court was moved to ſet ſuch a fine, that a third part thereof may be ſufficient to reimburſe the proſecutor a conſiderable part of his expence.

The court refuſed to ſet a ſmall fine, although the defendants, who had been found guilty on an indictment, would not conſent to go before the maſter.

A fine of thirty pounds was ſet upon each of the defendants.

And by *Ryder* Ch. J.—It has been ſaid, that in the caſe of *Rex* v. *Dyke and Three Others*, *Trin.* 21 & 22 *G.* 2. this court did ſet a very large fine upon the defendants, who were found guilty upon an indictment, with a declared intention, that the third part thereof might be ſufficient to reimburſe the proſecutor a conſiderable part of his expence: But the indictment in that caſe was for a publick nuſance, for which no action could be maintained; whereas the indictment, in the preſent caſe, is for private injury, for which an action might have been maintained.

Berwick *verſ.* Symonds.

If the plaintiff proceed after he has taken money out of court, he is not entitled to coſts.

UPON a rule to ſhew cauſe, why coſts ſhould not be paid to the plaintiff, it appeared; that four pounds had been brought into court upon the common rule; that after the plaintiff had taken the money out of court, he proceeded in the action; and that he has now diſcontinued the action.

The queſtion was, Whether the plaintiff ought to have coſts to the time of bringing the money into court?

It was holden that he ought not.

And by the court—By proceeding in the action, after the money was brought into court upon the common rule, the plaintiff forfeited his right to coſts; it being a part of that rule, that

that if the plaintiff will not accept of the money brought into the court with coſts, to be taxed by the maſter, in full diſcharge of the ſuit, the ſaid money ſhall be ſtricken out of the declaration, and be paid out of court to the plaintiff; and upon the trial of the iſſue, the plaintiff ſhall not be permitted to give evidence for the ſaid money.

Yates *verſ.* Carliſle.

UPON a rule to ſhew cauſe, why the defendant ſhould not have time to rejoin, it appeared; that the action was an action of treſpaſs; that the declaration, which was for breaking down a fence, was long; that the plea was neceſſarily long; that the replication was very long; that the rejoinder muſt neceſſarily be very long; and that many iſſues muſt be joined.

A rule made abſolute for time to rejoin in an action of treſpaſs.

It likewiſe appeared; that the defendant had brought an action upon the caſe for erecting the fence; and that the right of erecting the fence, which is the only thing that is really in queſtion between the parties, may be as well tried in the latter action, as in the action of treſpaſs: And it was ſaid; that it will be hard upon the defendant, to be forced on to trial in the action of treſpaſs, wherein there muſt be many iſſues; and conſequently, although the juſtice of the caſe is with the defendant, he may be liable to coſts, by reaſon of ſome one of the iſſues, upon which the merits do not in the leaſt depend, being found againſt him.

The rule was made abſolute.

And

And by *Ryder* Ch. J.—It has been ſaid; that as the making of the preſent rule abſolute will prevent the plaintiff from proceeding in his action, it will ſtop the courſe of juſtice; and that there is no inſtance of the court's interpoſing in ſuch caſe: But the vexatiouſneſs and oppreſſiveneſs of the plaintiff in the preſent action are ſo very apparent; that whether there be any inſtance of the court's interpoſing in ſuch caſe or not, it is proper to do it in the preſent caſe.

Rex *verſ.* The Inhabitants of St. Botolph, Biſhopſgate.

A woman's ſettlement is not ſuſpended by marrying a man who has no ſettlement in England.

IN an order of ſeſſions it was ſtated; that *Eleanor* the pauper, whoſe ſettlement was in the pariſh of *St. Botolph Biſhopſgate*, married *Finley* an *Iriſh* ſailor; that ſhe reſided ſome time with her huſband in the pariſh of *St. John Wapping*, and upon his going abroad, was left by him there; that her huſband has not to her knowledge any ſettlement in *England*; that ſhe believes her huſband to be ſtill living, having very lately received a letter from him; and that the pauper, together with a child which ſhe had by her huſband, had been removed to the pariſh of *St. Botolph*.

One queſtion was, Whether the pauper could be removed to the pariſh of *St. Botolph?*

It was holden that ſhe might.

And by *Ryder* Ch. J.—The ſettlement of a perſon in one pariſh does always continue, until a ſettlement is gained in another pariſh. It is not in the power of a perſon to determine his right to one ſettlement, in any other way than

than by the gaining of another; a ſettlement being a permanent thing, and the publick being intereſted therein. As the ſettlement of the pauper before her marriage was in the pariſh of *St. Botolph*, and as ſhe did not thereby acquire any other ſettlement, her ſettlement continues to be in that pariſh.

During the time that the huſband of the pauper cohabited with her in the pariſh of *St. John*, ſhe could not be removed from that pariſh to the pariſh of *St. Botolph*; becauſe her huſband could not be removed thither; and a married woman cannot be removed from her huſband: But as her huſband has now left her, there does not appear to be any reaſon, why ſhe ſhould not be removed to her own ſettlement.

It has been ſaid; that the removal of the pauper to the pariſh of *St. Botolph* will, in effect, be a divorce of her from her huſband; for that in caſe he ſhould return, it will not be lawful for him to cohabit with her in that pariſh: But this objection is not well founded; for as the huſband has no ſettlement in *England*, it will, in caſe he ſhould return, be as lawful for him to cohabit with his wife in the pariſh of *St. Botolph*, as in any other pariſh.

It has been ſaid; that in the caſe of *Rex* v. *The Inhabitants of Norton*, *Mich.* 23 *G.* 2. which was a caſe like the preſent, it was holden, that the ſettlement of the wife was ſuſpended during coverture; and it has been ſaid; that the maxim *ſtare deciſis* ought to be adhered to: But four or five antecedent caſes have been cited; in which it was holden, that the ſettlements of the wives did, in caſes like the preſent, continue. The maxim *ſtare deciſis*

ciſis is a good general maxim: But it is not always to be adhered to; and it muſt be allowed; that the court is as well warranted in the preſent caſe, to depart from what was holden in the caſe of *Rex* v. *The Inhabitants of Norton*, as the court was in that caſe, to depart from what had been holden in the four or five antecedent caſes.

Another queſtion was, Whether the child could be removed to the pariſh of *St. Botolph?*

It was holden that it might.

And by *Ryder* Ch. J.—If the father of a legitimate child have a ſettlement in *England*, his ſettlement is the ſettlement of the child: But if the father of ſuch child have no ſettlement in *England*, and the mother have, her ſettlement is the ſettlement of the child.

Rex *verſ.* The Inhabitants of Sudbury.

If a certificated perſon be removed to the pariſh by which the certificate was given, the certificate is ſatisfied and at an end.

IN an order of ſeſſions it was ſtated; that *Thomas Bladen*, together with his wife and the *Pauper* and his ſon, went in the year 1728 to reſide in the pariſh of *Utoxeter*, under a certificate from the pariſh of *Sudbury*, addreſſed to the pariſh of *Utoxeter*; that in the year 1731, *Thomas Bladen* being dead, and the wife becoming chargeable, ſhe, together with the *Pauper*, was removed to *Sudbury* by an order of two juſtices; that the certificate was not delivered up; and that the *Pauper* afterwards ſerved an apprenticeſhip in *Utoxeter*.

The queſtion was, Whether the *Pauper* did gain a ſettlement in *Utoxeter?*

It was holden that he did.

And

And by *Ryder* Ch. J.—We are of opinion; that the certificate was ſatisfied and at an end, by the removal of the wife and the pauper under an order of two juſtices; and conſequently, that the pauper was as capable of gaining a ſettlement in the pariſh of *Utoxeter* as in any other pariſh. If it ſhould be holden, that a certificate is not ſatisfied and at an end by one removal, under an order of two juſtices, it would be difficult to ſay when it is. As the conſequence of this uncertainty would be, that pariſhes would be averſe to the giving of certificates; the deſign of the certificate act would, in a great meaſure, be fruſtrated. The caſe of *Rex* v. *The Inhabitants of Sowerby*, *Hil.* 24 *G.* 2. has been cited, as an authority for the pauper's gaining a ſettlement in the pariſh of *Utoxeter*: But, there is a material difference betwixt that and the preſent caſe. In that caſe, the return of the family, to the pariſh which gave the certificate, was a voluntary act; whereas in the preſent caſe, the family was removed, to the pariſh by which the certificate was given, under an order of two juſtices.

Eaſter Term,

28 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Martin Wright,
Sir Thomas Deniſon,
Sir Michael Foſter,
Sir J. Eardley Wilmot, } *Juſtices.*

Rex *verſ.* Day.

A new trial cannot be granted by an inferior court.

UPON a rule to ſhew cauſe, why an attachment ſhould not be awarded, it appeared; that the defendant was underſheriff of the county of *Cambridge;* and that he had granted a new trial in a cauſe in the ſheriff's court.

The rule was diſcharged.

And by *Ryder* Ch. J.—In the caſe of *Hall* v. *Hill*, *Mich.* 1 *Ann. Farr.* 85. it is ſaid by *Holt* Ch. J. to be a rare thing for judges to grant a new trial before themſelves. In another report of the ſame caſe, by the name of the caſe of the *Mayor and Aldermen of Briſtol*, it

it is ſaid to have been holden; that an inferior court cannot grant a new trial. In the caſe of *Page* v. *Round*, *Paſch.* 10 *Ann.* in this court, it was holden; that an inferior court cannot grant a new trial. The ſame was holden in the caſe of *Brook* v. *Ewers and Wife*, *Mich.* 5 *G.* 1. in this court; and a *mandamus* was awarded for proceeding to judgment upon the verdict. Upon the whole it ſeems to be a ſettled point, that a new trial cannot be granted by an inferior court: But, as it does not appear, that the defendant acted either from a corrupt, or from a partial motive, the preſent rule ought not to be made abſolute; in as much as, a judicial officer is not anſwerable criminally for an error in judgment.

A rule was made to ſhew cauſe, why a *mandamus* ſhould not be awarded for proceeding to judgment upon the verdict; which, no cauſe being ſhewn, was at another day made abſolute.

And by *Wilmot* J.—It has of late years been the practice, to award a *mandamus* for proceeding to judgment, in the room of the writ *de procedendo ad judicium*.

Rex *verſ.* Chapman.

A conviction quaſhed; becauſe the offence was not therein particularly deſcribed.

UPON a rule to ſhew cauſe, why a conviction by a juſtice of the peace ſhould not be quaſhed, it appeared; that the conviction was upon the 43 *Eliz. c.* 7. whereby it is enacted, "that if any perſon ſhall rob an "orchard, not being felony by the laws of "this realm, being thereof convicted by the "teſtimony of one witneſs upon oath, before "one juſtice of the peace, ſhall give the party

" ſuch recompence, as by the ſaid juſtice " ſhall be ordered;" that it was ſtated in the conviction, that *J. S.* made oath before the juſtice, that the defendant *Martha Chapman* did rob the orchard of *Thomas Whitby*, the robbery not being felony by the laws of this realm; and that thereupon the juſtice did adjudge the ſaid *Martha Chapman* to be guilty of the ſaid robbery, and did order her to pay ten ſhillings and ſix-pence to the ſaid *Thomas Whitby*, by way of recompence.

The rule was made abſolute.

And by *Ryder* Ch. J.—It is laid down in 3 *Inſt.* 41. that although the words of a ſtatute, by which an offence is deſcribed, are general, the deſcription of the offence in an indictment muſt be particular; for that otherwiſe, the party indicted will not know what charge he is to defend himſelf againſt. The deſcription of the offence in a conviction ought to be quite as particular, or perhaps more ſo, as in an indictment; becauſe a conviction is a ſummary proceeding.

Theſe words in the preſent conviction, *the robbery not being felony by the laws of this realm*, are not a ſufficiently particular deſcription of the offence. The manner of the ſtealing ought to have been ſtated; that the court might have judged whether it were felonious, and conſequently whether the juſtice had a juriſdiction. If a tree cut down be ſtolen out of an orchard, this is felony. If a perſon come into an orchard in the day time, and ſhake apples from a tree; and afterwards come in the night and take them away, this is felony.

There

There is another reaſon, why the offence in the preſent conviction ought to have been deſcribed more particularly; namely, that the court might have judged, whether the money ordered to be paid was an adequate recompence to the party injured. In the caſe of *Regina* v. *Burnaby*, Lord *Raym.* 901. a conviction upon this ſtatute was quaſhed; becauſe it was only ſtated therein, that the defendant had cut down divers lime-trees; the opinion of the court being, that the number of the lime-trees ought to have been mentioned.

Rex *verſ.* Lewis.

An indictment for cheating quaſhed; becauſe no falſe token was made uſe of.

UPON a motion for quaſhing an indictment; the charge in the indictment appeared to be; that the defendant, intending to cheat and defraud *J. S.* had ſold to him eight hundred weight of gum, at the price of ſeven pounds by the hundred weight; falſely pretending and affirming, that the gum was *gum ſeneca*, and that it was worth ſeven pounds by the hundred weight; whereas in truth the gum was not *gum ſeneca*, but a gum of an inferior kind, and was not worth more than three pounds by the hundred weight.

As a ground for quaſhing the indictment, it was ſaid; that as no falſe token was made uſe of, an indictment will not lie; and the caſe of *Regina* v. *Jones*, Lord *Raym.* 1013. was cited; in which an indictment for obtaining money upon a falſe pretence was quaſhed.

A rule to ſhew cauſe was made; which, no cauſe being ſhewn, was afterwards made abſolute.

Rex

Eſplin *verſ.* Smollet.

If matter of fact, as well as matter of record be put in iſſue, the concluſion may be to the country.

AN action of *Scire Facias* being brought upon a recognizance entered into by the defendant, as bail of *J. S.* the defendant pleaded; that judgment was ſigned in the original action againſt *J. S.* that a writ of *Fieri Facias* was ſued out upon the judgment; and that the money due upon the judgment was levied off the goods of *J. S.* The plaintiff replied; that a writ of *Fieri Facias* was not ſued out upon the judgment againſt *J. S.* and that the money due upon the judgment was not levied off the goods of *J. S.* and the replication concluded to the country.

Upon a demurrer to this replication, it was holden to be good.

And by *Ryder* Ch. J.—It has been ſaid; that as the ſuing out of the writ of *Fieri Facias* was a matter of record, the replication ought not to have concluded to the country: But we are of opinion; that as the levying off the goods, which was a matter of fact, is put in iſſue by the replication, as well as the ſuing out of the writ of *Fieri Facias*, the concluſion to the country is proper.

Rex *verſ.* The Aldermen and Burgeſſes of the Borough of Heydon.

An abſolute rule for a *mandamus*, for proceeding to an election.

UPON a motion for a *mandamus*, for proceeding to the election of a mayor of the borough of *Heydon*, it appeared; that there was no election upon the day appointed by the charter, or upon the day next after the day appointed by charter; and that the office of mayor was vacant.

An

An abſolute rule for a *mandamus* was made.

And by *Deniſon* J. (*Ryder* Ch. J. being abſent) it has been generally the practice, in caſes like the preſent, to make a rule to ſhew cauſe: But we are of opinion; that it is not neceſſary, in ſuch caſes, to make a rule to ſhew cauſe.

Green *verſ.* Weſton.

IN a caſe reſerved in an action of debt upon a bond, it was ſtated; that the defendant was heir at law of *Henry Weſton*, and alſo deviſee of ſome land under the will of the ſaid *Henry Weſton*; that the bond, upon which the action was brought, was entered into by the teſtator *Henry Weſton*; that the defendant pleaded; that ſhe had ſold the deviſed land for the ſum of one hundred and ſixty-eight pounds, being the beſt price ſhe could get for the ſame, and had applied all the money the ſame was ſold for, being one hundred and ſixty-eight pounds, towards the ſatisfaction of a judgment, ſigned againſt her teſtator *Henry Weſton* during his life, for the ſum of three hundred and ſixty pounds; that the plaintiff replied; that the defendant had not applied all the money the deviſed land was ſold for towards the ſatisfaction of the ſaid judgment; that at the trial of an iſſue joined upon this replication, it was proved; that upon a treaty with *J. S.* for the purchaſe of the deviſed land, he refuſed to purchaſe it, unleſs he could purchaſe therewith a tile-ſhed erected upon the deviſed land, which was the property of *J. N.* that thereupon the defendant purchaſed the tile-ſhed of *J. N.* for the ſum of forty-two pounds, and paid for the

The deviſee of land is only to account for the real value of the land deviſed.

ſame with her own money; that ſhe did afterwards, in conſideration of the ſum of two hundred and ten pounds, convey the deviſed land, with the appurtenances, of which the tile-ſhed was parcel, by leaſe and releaſe to *J. S.* and gave a receipt for the conſideration money upon the back of the releaſe; and that ſhe had paid the ſum of one hundred and ſixty-eight pounds towards the ſatisfaction of the ſaid judgment.

The queſtion was, Whether the plaintiff be entitled to recover?

It was holden that he is not.

And by *Ryder* Ch. J.—By the 3 *W.* & *M.* *c.* 14. upon which ſtatute the preſent action is grounded, the deviſee of land is only to account, to the ſpecialty creditors of his teſtator, for the value of the deviſed land. In the preſent caſe, the value of the deviſed land was only one hundred and ſixty-eight pounds; the defendant's tile-ſhed, which was worth forty-two pounds, being ſold therewith; and the whole being ſold for no more than two hundred and ten pounds.

It has been ſaid; that, as it is not mentioned in the releaſe, that any part of the conſideration money, was to be paid for the tile-ſhed, evidence ought not to have been admitted, that any part of the ſame was received for the tile-ſhed: But we are of opinion; that this evidence was admiſſible. Suppoſe there had been a mortgage by the teſtator upon the deviſed land; and, after the money due thereupon had been paid off by the deviſee, the land had been conveyed by leaſe and releaſe, he might certainly have given evidence by way of deduction of the payment of this money, although it were not mentioned in the releaſe; becauſe, as to ſo much, the money

money received for the deviſed land would not be aſſets; and the ſame reaſon holds, for admitting the evidence, by way of deduction, that forty-two pounds, parcel of the two hundred and ten pounds, was not received for the deviſed land.

Rex *verſ.* Newſham and Others, Common-Council-Men of the Borough of Carmarthen.

A *mandamus* for proceeding to an election may be awarded, although there has been an election *de facto*.

UPON a rule to ſhew cauſe, why a *mandamus* ſhould not be awarded for proceeding to the election of a mayor of the borough of *Carmarthen*, it appeared; that by a by-law made in the reign of Queen *Elizabeth*, the right of electing a mayor of the borough was veſted in the major part of the common-council-men of the borough; that this right had been ever ſince that time exerciſed by the major part of the common-council-men; that upon the day appointed by the charter for the election of a mayor, a mob took poſſeſſion of the town-hall; that upon the ſucceeding day, another mob did the ſame; that upon the latter day *J. S.* was elected mayor by the burgeſſes at large; that *J. N.* who preſided at the election of *J. S.* was not the next perſon in rank or office to the preſent mayor, there being, at the time of that election, three other perſons nearer in rank or office to the preſent mayor than *J. N.* that the common-council, which when compleat conſiſts of twenty perſons, does at this time conſiſt of only eleven; and conſequently, that as not leſs than eleven common-council-men can elect a mayor, if a mayor be not elected, before one of the preſent common-council men ſhall

happen to die, no perſon, ſuppoſing the right of electing to be in the major part of the common-conncil, can ever be elected mayor.

One queſtion was, whether a *mandamus* can, in the preſent caſe, be awarded?

It was upon great conſideration holden, that it may.

And by *Ryder* Ch. J.—It has been ſaid; that this court is only empowered by the 11 *G.* 1. *c.* 4. to award a *mandamus*, "where it ſhall "happen, that *no election* of a mayor, or "other chief officer of a city, borough or "town corporate ſhall be made upon the day, "or within the time appointed by charter or "uſage for that purpoſe; and that *no election* "of ſuch officer ſhall be made purſuant to the "directions of this ſtatute; or ſuch election "being made, ſhall afterwards become "void;" and it is inferred; that as there has been, in the preſent caſe, an election *de facto* of a mayor, and that election is not yet determined to be void, the court cannot award a *mandamus* for proceeding to an election of a mayor. But we are of opinion; that the words *no election* in that ſtatute, ought to be conſtrued *no legal election;* and conſequently, that although there has been an election *de facto*, the court has a diſcretionary power, upon conſidering all the circumſtances of the election, to award or not to award a *mandamus*, as the juſtice of the caſe may require. If on all the circumſtances of an election *de facto*, the legality thereof be doubtful, the court ought not to award a *mandamus;* it being in ſuch caſe proper, that the legality of the election ſhould be tried in an information in the nature of a *quo warranto:* But if upon all the circumſtances of an election *de facto*, it appear clearly to be illegal, the court ought to award

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a *mandamus*; becauſe it would, in ſuch caſe, be nugatory, to try the legality of the election in an information in the nature of a *quo warranto*.

Another queſtion was, Whether a *mandamus* ought, in the preſent caſe, to be awarded?

It was holden that it ought.

And by *Ryder* Ch. J.—The court does not mean to give any opinion as to the right of election; but, in whomſoever that right may be, the election of *J. S.* appears clearly to be illegal. It was in a riotous manner; and the perſon, who ought to preſide at the election of a mayor, did not preſide thereat. The circumſtance, that the common-council-men are reduced to the loweſt number which can elect a mayor, is likewiſe of great weight in the preſent caſe; for if the right of election be in the major part of the common-council-men, and any one of the preſent common-council-men ſhall happen to die before there is an election of a mayor, there never can be an election; and conſequently, the corporation muſt be diſſolved.

The rule was made abſolute: But it was ordered to be therein inſerted, that the *mandamus* is to be without prejudice to the right of election; and that it ſhall be directed to the common-council-men generally, and not to any one or more of them by name. It was likewiſe ordered, that the names of two indifferent perſons ſhall be inſerted in the rule for the *mandamus*; by whom ſix days notice, at the leaſt, ſhall be given of the day appointed for the election.

Bennet

happen to die, no perſon, ſuppoſing the right of electing to be in the major part of the common-council, can ever be elected mayor.

One queſtion was, whether a *mandamus* can, in the preſent caſe, be awarded?

It was upon great conſideration holden, that it may.

And by *Ryder* Ch. J.—It has been ſaid; that this court is only empowered by the 11 *G.* 1. c. 4. to award a *mandamus*, "where it ſhall "happen, that *no election* of a mayor, or "other chief officer of a city, borough or "town corporate ſhall be made upon the day, "or within the time appointed by charter or "uſage for that purpoſe: and that *no election* "of ſuch officer ſhall be made purſuant to the "directions of this ſtatute: or ſuch election "being made, ſhall afterwards become "void," and it is inferred: that as there has been, in the preſent caſe, an election de facto of a mayor, and that election is not yet determined to be void, the court cannot award a *mandamus* for proceeding to an election of a mayor. But we are of opinion: that the words *no election* in that ſtatute, ought to be conſtrued *no legal election*: and conſequently, that although there has been an election de facto, the court has a diſcretionary power, upon conſidering all the circumſtances of the caſe, to award or not to award a *mandamus*, as the juſtice of the caſe may require. If on all the circumſtances of an election de facto, the legality thereof be doubtful, the court ought not to award a *mandamus*, it being in the [illegible] that the legality of the election ſhould be tried in an information in the nature of a quo warranto. But if upon all circumſtances of an election de facto, it ſhall be illegal, the court ought

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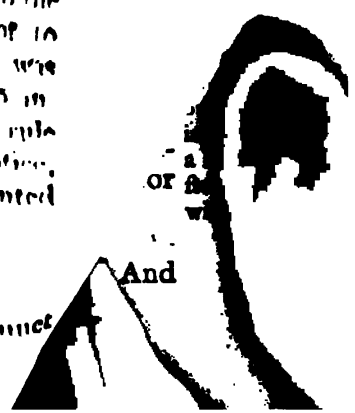

Bennet *verſ.* Hart.

A writ of enquiry awarded for the aſſeſſing of treble damages.

UPON a rule to ſhew cauſe, why a writ of enquiry ſhould not be awarded, for aſſeſſing the treble damages given by the 43 *Eliz. c.* 2. it appeared; that the action was brought on account of ſomething done by the defendant, as overſeer of the poor, by virtue of his office; that there was a verdict for the defendant; that the jury aſſeſſed only ſingle damages; that there was no ſuggeſtion upon the *poſtea;* and that the maſter had refuſed to allow more than ſingle coſts.

The rule was made abſolute.

And by the court——It has been ſaid; that as ſingle coſts have been taxed, the preſent application is too late: But we are of opinion; that as the taxing of ſingle coſts was not at the deſire of the defendant, the court is not precluded by the act of the maſter, who refuſed to allow more coſts, from awarding a writ of enquiry. As a ground for awarding a writ of enquiry, it is neceſſary to enter a ſuggeſtion upon the *poſtea;* that the defendant was an overſeer of the poor; and that the action was brought againſt him for ſomething done by virtue of his office.

Rex

Rex *verſ.* Lawſon.

Further time for the trying of a feigned iſſue refuſed.

UPON a rule to ſhew cauſe, why a *mandamus* ſhould not be awarded, for admitting the defendant to the office of clerk of the peace of the county of *Surry*, it appeared; that upon ſhewing cauſe to the rule at a former day, a feigned iſſue was ordered by conſent, to try whether the right to the office was in the defendant, or in *J. S.* that the record of the iſſue was entered by *J. S.* at the office for the county of *Surry*; and that he afterwards withdrew the record.

The queſtion was, Whether further time ought to be allowed to *J. S.* for trying the iſſue.

It was holden that it ought not.

And by the court—As it does not appear that, there was any good reaſon for withdrawing the record, no further time ought to be allowed.

Thomlinſon *verſ.* Brown.

An action will lie for the owner of the inheritance in a houſe for ſtopping up windows.

UPON a rule to ſhew cauſe, why judgment ſhould not be arreſted, it appeared; that the action was an action upon the caſe; that it was brought by the owner of the inheritance in a houſe againſt his own leſſee, for ſtopping up divers windows of the houſe.

The rule was diſcharged.

And

And by the court—It has been ſaid; that as the nuſance to the houſe, by ſtopping up divers windows, may be abated, before the defendant's term is expired, the plaintiff cannot at preſent maintain an action againſt his own leſſee for ſtopping them up: But we are of opinion; that the plaintiff may at preſent maintain an action for the injury to his inheritance, by obſtructing the ingreſs of light and air into the houſe; and that this action does as well lie againſt the plaintiff's own leſſee, as againſt any other perſon.

Baines *verſ.* Blackbourne.

The pendency of a prior action cannot be pleaded in abatement.

IN an action of debt, brought for the exerciſe of a trade contrary to the 5 *Eliz. c.* 4. the defendant pleaded in abatement; that a prior action was depending for the ſame matter.

Upon a demurrer to this plea, it was holden to be bad.

And by the court—The pendency of a prior action for the ſame matter may be pleaded in bar to a ſecond action: But it cannot be pleaded in abatement.

Rex *verſ.* The Juſtices of the Peace for the Town of Nottingham.

An information againſt juſtices of the peace for refuſing to grant licenſes.

UPON a rule to ſhew cauſe, why an information for a miſdemeanor ſhould not be filed, it appeared; that the defendants, who were juſtices of the peace for the town of *Nottingham*, had refuſed to grant licenſes for twenty publick houſes in that town; that

that licenſes had for ſome years paſt been granted to the occupiers of theſe houſes; and that the occupiers of theſe houſes and the defendants had, at a conteſted election for that town, a ſhort time before the time for licenſing publick houſes, had for different candidates.

The rule was made abſolute.

And by *Ryder* Ch. J.—It has been truly ſaid; that the power of licenſing publick houſes is ſo abſolutely in the diſcretion of the juſtices of the peace, that this court will never award a *mandamus* for the licenſing of a publick houſe: But it is equally true; that the abuſe of a diſcretionary power ought to be more ſeverely puniſhed than the abuſe of a power which is not diſcretionary. In the preſent caſe it appears manifeſtly, that the power of licenſing publick houſes was very groſsly abuſed; for it is not probable, that the occupiers of twenty publick houſes ſhould all have ſo miſbehaved themſelves at the ſame time, as to make it improper to grant them licenſes.

Uppendale *verſ.* Lightfoot.

A plaintiff may proſecute his ſuit in perſon.

UPON a writ of error, the error aſſigned was; that the plaintiff in the original action had proſecuted his ſuit in perſon, and not by attorney.

The judgment was affirmed.

And by the court——It is lawful for the plaintiff in an action, to proſecute his ſuit in perſon.

Rex *verſ.* Laurence.

An affidavit ought not to be entitled, unleſs there be ſome cauſe depending in the court.

UPON a rule to ſhew cauſe, why an information for a miſdemeanor, ſhould not be filed, it appeared; that the affidavit, upon reading of which the rule was made, was entitled *Rex* v. *Laurence*.

The rule was diſcharged.

And by the court—The affidavit whereupon the motion for this rule was made, ought not to have had any title; becauſe, until the rule was made, there was no cauſe, under the name of *Rex* v. *Laurence*, depending in the court.

Huſſey *verſ.* Welby.

A *Scire Facias* upon a judgment may be ſued out by a new attorney without the leave of the court.

UPON a rule to ſhew cauſe, why the proceedings upon a *Scire Facias* ſhould not be ſet aſide for irregularity, it appeared; that the *Scire Facias*, which was brought upon a judgment, was not ſued out by the attorney, who had been concerned in the original action; that the leave of the court had not been obtained for changing the attorney; and that no notice had been given of the attorney being changed.

The rule was diſcharged.

And by the court—If the attorney retained in a cauſe be changed during the cauſe, without the leave of the court, or if notice be not given that the attorney is changed, the ſubſequent proceedings are irregular: But as a *Scire Facias* upon a judgment is a new action, in which there ought to be a new retainer,

tainer, the *Scire Facias* may be ſued out by a new attorney, without the leave of the court for changing the attorney, or giving notice that he is changed.

Williams *verſ.* Williams.

UPON a motion to ſtay the proceeding in an action, upon the ground of the action's being below the dignity of the court, an affidavit was offered; in which it was alledged; that no more than the ſum of five ſhillings and eight pence was due to the plaintiff.

An affidavit that only a ſmall ſum of money is due, was not permitted to be read.

No rule was made; the affidavit not being permitted to be read.

Trinity Term,

28 & 29 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Thomas Deniſon,
Sir Michael Foſter,
Sir J. Eardley Wilmot, } *Juſtices.*

Goddard *verſ.* Law.

If that which is contained under a *ſcilicet* be repugnant, it may be rejected.

IN an action of *aſſumpſit*, the defendant, an executor, pleaded; that at the time of exhibiting the plaintiff's bill, he had fully adminiſtered.

The plaintiff replied; that at the time of exhibiting his bill; to wit, *eight days before*, the defendant had aſſets in his hands.

Upon a demurrer to this replication, it was holden to be good.

And by *Ryder* Ch. J.—It has been ſaid; that if iſſue be joined upon the replication, the defendant will not be allowed to give evidence of any money paid by him within the eight days

days preceding the time of exhibiting the plaintiff's bill: But we are of opinion, that he may give ſuch evidence: that the words *eight days before*, which are contained under a *ſcilicet*, and are repugnant to the poſitive allegation in the replication, ought not to be regarded.

Doley *verſ.* Pitſtow.

An umpieage is good, although it be made by an umpire, choſen before the time for making an award is expired.

AN action of debt being brought upon a bond, and Oyer being prayed of the bond, the condition appeared to be; that the defendant ſhall perform the award of *A. B.* and *C. D.* ſo as an award be made by them, on or before the thirteenth day of *March* then next enſuing; otherwiſe, that the defendant ſhall perform the umpirage of ſuch perſon as ſhall be choſen umpire by the ſaid *A. B.* and *C. D.* ſo as the umpire ſhall make an umpirage, on or before the ſeventeenth day of the ſaid *March.*

The defendant pleaded; that *A. B.* and *C. D.* did not make an award on or before the ſaid thirteenth day of *March;* and that no perſon was choſen umpire by them, after the ſaid thirteenth day of *March.*

The plaintiff replied; that before the ſaid thirteenth day of *March*, to wit, upon the eleventh day of that month, *E. F.* was choſen umpire by the ſaid *A. B.* and *C. D.* and that an umpirage was made by the ſaid *E. F.* on or before the ſaid ſeventeenth day of *March.*

Upon a demurrer to this replication, the queſtion was, whether the arbitrators could chooſe an umpire, before the time allowed for their making an award was expired.

It

It was upon great conſideration holden that they might.

And by *Ryder* Ch. J.—The caſe of *Reynolds* v. *Gray*, *Salk.* 70. has been cited and relied upon; in which it was ſaid by *Holt* Ch. J. that arbitrators cannot chooſe an umpire, until the time allowed for their making an award is expired. It does not appear from the report of that caſe in *Salkeld*, or from another report thereof in Lord *Raymond* 222. whether there were any words in the rule of court, by which the arbitrators were appointed, to reſtrain them from chooſing an umpire, until the time allowed for making an award is expired. If there were ſuch words in the rule, that caſe is of no authority in the preſent caſe, wherein the arbitrators are not ſo reſtrained. If there were not ſuch words in the rule, we are of opinion; that the caſe is not law. In the caſe of *Jennings* v. *Vandeputt*, *Cro. Car.* 263. it is laid down; that arbitrators may chooſe an umpire before the time allowed for their making an award is expired; and that an umpirage made by the umpire, ſo choſen is good, in caſe the arbitrators do not make an award within that time. The ſame is laid down in the caſe of *Watſon* v. *Mitchell*, 1 *Roll. Abr* 262. and in that of *Elliot* v. *Cheval*, 1 *Lutw.* 41. In the caſe of *Cordwell* v. *Mackarell*, *Trin.* 17 *G.* 2. in this court, the authority of theſe caſes was recognized; and it was therein holden; that an umpirage made during the time allowed for making an award is good, in caſe the arbitrators do not make an award within the time.

Sir

Sir Joſeph Hankey and Company *verſ.* Wilſon.

Actual proof, that the name of an indorſor is of his hand-writing, is not always neceſſary.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an action of *aſſumpſit*, it appeared; that the action was brought by the plaintiffs, as indorſees of a bill of exchange; that the defendant had accepted the bill; that there was no actual proof, that the name of one of the indorſors of the bill is of his hand-writing; that the name of that indorſor, and the names of all the other indorſors were upon the bill at the time of its being accepted; that at the time of his accepting it, the defendant promiſed to pay the bill; and that upon this evidence, which was left by *Ryder* Ch. J. to the jury, a verdict was found for the plaintiffs.

The queſtion was, Whether upon this evidence the matter ought to have been left to the jury?

It was holden that it ought.

And by the court—It is in the general neceſſary, to give actual proof, that the name of every indorſor is of his hand-writing: But it is not neceſſary to do this in every caſe. In the preſent caſe, it was a matter proper for the determination of the jury, whether the acceptance of the bill, when all the indorſors names were upon it, together with the promiſe to pay, did not amount to an admiſſion, that the name of every indorſor is of his hand-writing; in as much as, ſuch an admiſſion would ſuperſede the neceſſity of actual proof, that the name of any indorſor is of his hand-writing.

Brenan

Brenan *verſ.* Currint.

If there be a ſpecial agreement, the general right of detaining a thing delivered is thereby waved.

IN a caſe reſerved, in an action of *Trover*, it was ſtated; that an agreement was entered into by the plaintiff and the defendant, whereby the ſum of ten ſhillings and ſixpence was to be paid to the defendant, a farrier, for curing the plaintiff's mare of a diſtemper, as ſoon as ſhe ſhould be cured, and likewiſe a reaſonable ſum of money for keeping the mare, until ſhe ſhould be cured; that in purſuance of this agreement, the mare was delivered to the defendant; that after the mare was cured, the plaintiff tendered the ſum of ten ſhillings and ſixpence to the defendant for the cure, and at the ſame time demanded the mare; that the defendant refuſed to deliver the mare, unleſs the plaintiff would pay a groſs ſum of money for the cure and keeping of the mare; and that the action was brought for the converſion of the mare.

The queſtion was, whether the defendant had a right to detain the mare?

It was holden that he had not.

And by *Ryder* Ch. J—As the ſum of ten ſhillings and ſixpence, the ſum agreed to be paid for the cure, was tendered to the defendant, he certainly had not a right to detain the mare on account of the cure.

It has been ſaid; that a farrier has a right to detain a beaſt delivered to him to be cured, until the money due for keeping the beaſt is paid or tendered: But it is not neceſſary to give any opinion upon this point; for altho' we ſhould be of opinion, that a farrier has,

in

in the general, ſuch a right; yet it would be clear, that the defendant had not in the preſent caſe a right to detain the mare; becauſe his general right to do this, in caſe he had ſuch a right, was waved by the ſpecial agreement, that a reaſonable ſum of money was to be paid to him for keeping the mare, until ſhe ſhould be cured.

Rex *verſ.* Bathurſt.

If any count in an indictment be good, the indictment is good.

IN an indictment for a forcible entry, it was charged in the firſt count; that the defendant did unlawfully and injuriouſly, with force and arms, and with a ſtrong hand, enter into a meſſuage in the peaceable poſſeſſion of the proſecutor, againſt the form of the ſtatute. In the ſecond Count it was charged; that the defendant did unlawfully and injuriouſly, with force and arms, enter into the dwelling houſe of the proſecutor.

Upon a demurrer to this indictment, one queſtion was, whether the firſt count be good?

The juſtices were all of opinion; that this count is not good upon the ſtatute, becauſe it is not therein ſhewn, what eſtate the proſecutor had in the meſſuage; for he might be only tenant at will, and if he were ſo, a forcible entry upon the meſſuage is not an offence againſt the ſtatute.

Ryder Ch. J. and *Foſter* J. were of opinion; that although the firſt count be not good upon the ſtatute, it is, notwithſtanding the concluſion thereof, good at the common law: And *Foſter* J. mentioned the caſe of *Page* v. *Harwood*, *All.* 43. in which it was holden; that, notwithſtanding

ſtanding the offence charged in an Indictment be not an offence againſt a ſtatute, and the concluſion of the indictment be againſt the form of the ſtatute, the perſon indicted may be found guilty of an offence at the common law, in caſe the offence charged be an offence at the common law. He added; that forcible entry is an offence at the common law, and not one created by the ſtatute; for that the ſtatute does only, by ordering poſſeſſion to be reſtored, give a more ſpeedy remedy.

Deniſon J. admitted; that a count in an indictment may, in ſome caſes, be good at the common law, although the concluſion thereof be againſt the form of the ſtatute: But as the entry is charged in the firſt count in the preſent indictment to be into a meſſuage, and to be with a ſtrong hand, which words are contained in the ſtatute againſt forcible entry, he doubted whether that count, as it appears to be a count upon the ſtatute, be good at the common law. He added; that in 2 *H. H. Pl. C.* it is laid down; that if a perſon be indicted upon a ſtatute, and the charge in the indictment do not bring him within the ſtatute, he ſhall not be put to anſwer upon this indictment for an offence at the common law.

Wilmot J. gave no opinion upon this queſtion.

Another queſtion was, Whether the ſecond count be good?

It was holden that it is.

And by *Ryder* Ch. J.—It has been ſaid; that as the entry is not charged in this count to be with a ſtrong hand, as well as with force and arms, there is not a charge of actual force; in

in as much as, the words force and arms which are contained in the declaration in every action of *treſpaſs*, do not neceſſarily imply actual force. As the words with a ſtrong hand are contained in the ſtatute, it is neceſſary that theſe words ſhould be contained in an indictment upon the ſtatute: But it is not neceſſary, that theſe words ſhould be contained in an indictment at the common law for a forcible entry. The words force and arms, in an indictment at the common law for a forcible entry, do always mean actual force; and if iſſue had been joined in this indictment upon the plea of not guilty, actual force muſt have been proved, or the defendant could not have been found guilty upon the ſecond count; an entry without actual force being no more than a treſpaſs.

It is alledged in this count; that the defendant had not a right of entry into the proſecutor's dwelling-houſe; and the defendant by demurring has admitted that he had not: But if he had, his obtaining poſſeſſion thereof by force was tortious; and it would be extremely hard, that the proſecutor, who had been tortiouſly deprived of the poſſeſſion of his dwelling houſe, ſhould, in order to recover it, be forced to ſubmit to the trouble, expence and delay of an ejectment.

It is material; that the entry is in this count charged to be into a dwelling houſe; for a dwelling houſe is of great regard in the eye of the common law. A dwelling houſe is called a man's caſtle; and upon the idea of its being ſo, it is lawful for him to aſſemble perſons to aſſiſt in the defence thereof. The offence of burglary at the common law cannot be committed, unleſs the houſe broken and entered

were a dwelling houſe. It is in the general unlawful, to break open the door of a dwelling houſe; although it be done to execute the proceſs of the law.

As we are all of opinion; that the ſecond count is good, it would be to no purpoſe, to let this caſe ſtand over for conſideration as to the firſt count; for whatever might be the ultimate opinion of the court as to that count, there muſt, as one count is good, be judgment for the king.

Rex *verſ.* The Inhabitants of Horſley.

The ſon of a certificated man may gain a ſettlement, by a hiring and ſervice in a third pariſh.

IN an order of ſeſſions it was ſtated; that the *Pauper* was born in the pariſh of *Hollingſclough*, whilſt his father reſided there under a certificate from the pariſh officers of *Horſley*, addreſſed to the pariſh officers of *Hollingſclough*; that at the age of twelve years he was hired for a year in the pariſh of *Peck*, and ſerved the year.

The queſtion was, Whether the *Pauper* did gain a ſettlement in the pariſh of *Peck*?

It was holden, that he did.

And by the court—The caſe of *Rex* v. *The Inhabitants of Silton*, *Hil.* 21 *G.* 2. is almoſt in point. It was in that caſe holden; that the ſon of a certificated man, who was born in the pariſh of *Wincanton*, during his father's reſidence there under a certificate from the pariſh officers of *Silton*, addreſſed to the pariſh officers of *Wincanton*, gained a ſettlement by ſerving as an apprentice in the pariſh of *Horſington*.

Rex

Rex *verſ.* Hanſon.

UPON a motion to quaſh an indictment for a cheat, it appeared; that the defendant, intending to deceive and defraud *J. S.* pretended and affirmed to him, that ſhe was a ſingle woman, and that her name was *Fuller*; by means whereof ſhe obtained credit from *J. S.* for board and lodging to the amount of three pounds; whereas ſhe was in truth a married woman, and the wife of a poor labouring man of the name of *Hanſon*.

An Indictment, which is not clearly bad, ought not to be quaſhed.

A rule to ſhew cauſe was refuſed.

And by *Ryder* Ch J.—We are inclined to be of opinion; that the indictment is good: But it is not neceſſary to give a poſitive opinion as to that; for unleſs an indictment be clearly bad, which the indictment in the preſent caſe certainly is not, the court will not quaſh it.

Rex *verſ.* Nichols and Another.

A *Mandamus* having been awarded, whereby the defendants, who were juſtices of the peace, were commanded to appoint overſeers of the poor for *Walſal Foreign*, the return was; that *Walſal Foreign* is not a diſtinct diviſion from *Walſal* Borough.

The coſts, incurred before a feigned iſſue was ordered, ought not to be paid.

A rule was afterwards made, to ſhew cauſe, why an information ſhould not be filed againſt the defendants for a falſe return.

Upon

Upon ſhewing cauſe to this rule, a feigned iſſue was with conſent ordered, to try whether *Walſal Foreign* be a diſtinct diviſion from *Walſal* Borough; and it was inſerted in the rule for the feigned iſſue, that coſts ſhall abide the event of the trial.

It being found by a verdict, that *Walſal Foreign* is a diſtinct diviſion from *Walſal* Borough, and a peremptory *Mandamus* being awarded; the queſtion was, Whether the defendants ought to pay the coſts of the rule for the information, which were incurred by the proſecutor before the feigned iſſue was ordered?

It was holden, that they ought not.

And by *Ryder* Ch. J.—It has been ſaid; that if the rule for the information had been made abſolute, and there had been a verdict againſt the defendants, the court, unleſs they would have conſented to go before the maſter, would, as has in ſome caſes been done, have ſet a fine ſo large, that the third part thereof might have been ſufficient to reimburſe the proſecutor his coſts, or at leaſt a conſiderable part thereof; and it has been inferred; that as the queſtion would have been the ſame upon the information, as it was upon the feigned iſſue, the coſts of the rule for the information ought to be paid. But all this proceeds upon a miſtake; for as the queſtion in the information would in effect, have been a queſtion concerning a civil right; namely, whether *Walſal Foreign* ought to have ſeparate overſeers: The court, although there had been a verdict againſt the defendants, and they had refuſed to go before the maſter, would not have ſet a large fine.

We

We do moreover deſire to have it underſtood; that, whatever may have been heretofore done, the court will not for the time to come ſet a larger fine, in any caſe of a conviction upon an indictment, than the nature of the offence does require; although the perſon convicted refuſes to go before the maſter.

Rex *verſ.* The Inhabitants of High and Low Biſhopſide.

IN an order of ſeſſions it was ſtated; that *Jonathan Joye* reſided ſome years in the pariſh of *High* and *Low Biſhopſide*, under a certificate from the pariſh officers of *Menwith cum Darley*, addreſſed to the pariſh officers of *High* and *Low Biſhopſide*; that during his reſidence under the certificate, he purchaſed a houſe in the pariſh of *Dacre cum Buerley* for the ſum of ten pounds, and went to dwell therein; that upon his going to dwell in this houſe, he carried the certificate, under which he had reſided in the pariſh of *High* and *Low Biſhopſide*, and delivered it to the pariſh officers of *Dacre cum Buerley*; and that the *Pauper* ſerved an apprenticeſhip with *Jonathan Joye*, whilſt he dwelt in the pariſh of *Dacre cum Buerley*.

Only the pariſh, to which a certificate is addreſſed, can avail itſelf thereof.

The queſtion was, Whether the *Pauper* did gain a ſettlement in the pariſh of *Dacre cum Buerley*?

It was holden that he did.

And by *Ryder* Ch. J.—No pariſh is by the 8 & 9 *W.* 3. *c.* 30. obliged to receive a perſon under a certificate, unleſs the certificate be addreſſed to its officers; and conſequently, no pariſh,

pariſh, except the pariſh to the officers of which a certificate is addreſſed, can avail itſelf of the certificate. The delivering of the certificate to the pariſh officers of *Dacre cum Buerley*, beſides being nugatory, was quite unneceſſary; in as much as *Jonathan Joye* had a right to dwell in the houſe he had bought without a Certificate. It may be inferred, from the 2 *Ann. c.* 18. by which it is provided, that an apprentice to a certificated man ſhall not gain a ſettlement in the pariſh, to the officers of which the certificate is addreſſed, that ſuch an apprentice may gain a ſettlement in any other pariſh.

Aſhworth *verſ.* Lord.

If there be a covenant to pay one of two things, it is not neceſſary to make an Election which ſhall be paid.

UPON a rule to ſhew cauſe, why judgment ſhould not be arreſted in an action of covenant, it appeared; that the action was brought upon a covenant in a leaſe, under which the defendant was bound to pay annually to the Plaintiff two hens, or in lieu thereof one ſhilling, at the election of the plaintiff; and the breach aſſigned was, that the defendant did not pay either the two hens or the ſhilling.

The rule was diſcharged.

And by *Ryder* Ch. J.—It has been ſaid; that the plaintiff ought not to have judgment, becauſe it is not alledged in the declaration, that he had made an election. If the breach aſſigned were, that the defendant did not pay one of the two ſhillings, the plaintiff muſt have alledged, that he had made an election to have that thing paid: But as the breach aſſigned is, that the defendant did not pay either of the two ſhillings, it was not neceſſary for the plaintiff to alledge, that he had made an election.

Rex

Rex *verſ.* Roch.

THE defendant, who had been convicted upon an indictment for an aſſault, being brought up for judgment, an affidavit was offered, in order to mitigate the puniſhment, in which it was alledged; that previouſly to the aſſault, the proſecutor had very much provoked the defendant: But it did not appear; that any evidence was given of this at the trial.

An affidavit, as to a matter of which no evidence was given at the trial, was not permitted to be read.

The court would not permit the affidavit to be read.

And by *Ryder* Ch. J.—If there were ſuch provocation, evidence ought to have been given of it at the trial; that being the proper time for the defendant to have availed himſelf thereof.

Green *verſ.* Haſſel.

AN attorney had delivered two ſeparate bills; one of which was for fees and diſburſements in cauſes, the other for making conveyances.

An attorney's bill for making conveyances may be taxed.

Upon a motion that both bills might be referred to be taxed, the caſe of *Dalſton* v. *Hartcliffe* was cited; in which the Court of Chancery ordered one bill of a ſolicitor for fees and diſburſements in cauſes, and another for making conveyances to be taxed.

A rule was made to ſhew cauſe, which, no cauſe being ſhewn, was afterwards made abſolute.

Clark *verſ.* Glaſs.

If a traverſe be to the whole matter pleaded, it muſt conclude to the country.

IN an action of debt upon a bond, the defendant pleaded; that the bond was executed by him through force and reſtraint of Impriſonment.

The plaintiff replied; that the defendant executed the bond of his own free will; without this, that he executed it through force and reſtraint of impriſonment, and concluded with an averment.

Upon a demurrer to this replication, the queſtion was, Whether the concluſion be good?

It was holden, that it is not.

And by *Ryder* Ch. J.—The true diſtinction as to this point is, in our opinion, taken in the caſe of *Haywood* v. *Davis and Another*, *Farr.* 105. namely, that if a traverſe be only to a particular fact of the plea, it muſt conclude with an averment: But if to the whole plea, it muſt conclude to the country. In the preſent caſe, the traverſe is to the whole of the plea; and conſequently, the concluſion ought to have been to the country.

Cope *verſ.* Marſhall.

An amendment, alledging a new right of action, refuſed.

UPON a rule to ſhew cauſe, why the declaration in an action of *treſpaſs* ſhould not be amended, by adding the words, *and free Chaſe*,

Chaſe, after the Words *free Warren*, it appeared; that the plaintiff had alledged, that the defendant broke and entered his free warren; and that the action had been commenced more than two terms.

The rule was diſcharged.

And by the court—By the amendment intended a new right of action would be alledged; a free chaſe being quite a different thing from a free warren. It is likewiſe probable, that the defendant, if the amendment ſhall be permitted, will be rendered incapable of making any defence. As the declaration now ſtands, he may preſcribe for a right of common in the free warren; becauſe a right of free warren muſt always be founded upon a grant: But, as a right of free chaſe can only be acquired by preſcription, the defendant will not be able to preſcribe for a right of common in the free chaſe; it being a rule of law, that one preſcriptive right cannot be ſet up againſt another. The caſe of *Bearcroft* v. *The Hundreds of Burnham and Stone*, 3 *Lev.* 347. has been cited; in which, after the plaintiff had alledged in his declaration a robbery of himſelf, leave was given to amend, by alledging that the robbery was of a ſervant. The caſe of *the Executors of the Duke of Marlborough* v. *Widmore*, *Hil.* 4 *G.* 2. in this court, has likewiſe been cited; in which, after the plaintiffs had alledged in their declaration a promiſe to their teſtator, leave was given to amend, by alledging a promiſe to themſelves. But the amendments in both theſe caſes, were allowed upon the very particular circumſtances of the caſes. In the former caſe, which was an action upon the ſtatute of Hue and Cry, the time for bringing

a new action was expired. In the latter caſe, which was an action of *Aſſumpſit*, as the defendant had pleaded the ſtatute of limitations, the plaintiffs muſt not only have failed in that action, unleſs leave had been given to amend: But it would have been too late to bring a new action; ſix years being elapſed ſince the promiſe was made to themſelves. In the preſent caſe, the plaintiff may diſcontinue and bring a new action; and conſequently there is no neceſſity to depart from a general rule of law; namely, that an amendment, by which a new right of action would be alledged, ought not to be permitted. The giving leave to amend in the preſent caſe would, moreover, be contrary to another general rule of law; which is, that ſuch an amendment as amounts to the adding of a new count, which the amendment intended certainly does, ought not to be permitted, after the action has been commenced two terms.

Doe on the Demiſe of Barnard and Fenton *verſ.* Reaſon.

A remainder, limited by a will to a perſon *in eſſe*, does always veſt *eo inſtante* the teſtator dies.

IN an action of Ejectment, it was found by a ſpecial verdict; that *Edward Brogden*, being ſeiſed in fee of the premiſſes in queſtion, deviſed them in the following words: "I give "and deviſe all my meſſuages in *Leeds* to my "wife *Elizabeth*, for the term of her natural "life, without impeachment of waſte; and "after her deceaſe, I give and deviſe the ſame "to *Elizabeth Croſon* my niece, for her natural "life, without impeachment of waſte; and "immediately after her deceaſe, I give and "deviſe the ſame to ſuch iſſue of the body of "my ſaid niece, as ſhall be then living; and

"to

" to the heirs of ſuch iſſue; that is to ſay, in " caſe there ſhall be only ſuch iſſue one child, " then I give the whole to that one child and " its heirs; and if there ſhall be iſſue two or " more children, then to ſuch two or more " children equally amongſt them, ſhare and " ſhare alike, and the heirs and aſſigns of " ſuch two or more children, to take both " freehold and inheritance as tenants in com- " mon, and not as joint tenants; and in caſe " my ſaid niece ſhall die without iſſue of her " body then living; or in caſe all ſuch iſſue " ſhall die without iſſue, ſo that all and every " the deſcendants of her body ſhall be dead " without iſſue, then, and not before, I give " and deviſe all the aforeſaid premiſes to my " couſins *Thomas Barnard* and *James Fenton*, " their heirs and aſſigns for ever."

It was likewiſe found that upon the teſtator's death in the year 1744, his wife entered; that upon her death in the year 1750, *Elizabeth Croſon* entered; that ſhe afterwards intermarried with the defendant; that in *Trinity* Term 1751, the defendant and his wife ſuffered a common recovery, and declared the uſes thereof to themſelves for life, with remainder to the defendant in fee; that the defendant's wife died in *October* 1752; that ſhe never had any iſſue of her body; that *James Fenton*, one of the leſſors of the plaintiff, is one of the deviſees of *Edward Brogden*; and that *Thomas Barnard*, the other leſſor of the plaintiff, is the eldeſt ſon and heir of the other deviſee *Thomas Barnard*.

The queſtion was, Whether the leſſors of the plaintiff ought to recover?

It was holden, upon great conſideration, that they ought.

And

And by *Ryder* Ch. J.—It has been ſaid; that the deviſe to *Thomas Barnard* and *James Fenton* may take effect, by way of executory deviſe: But we are of opinion, that as it may take effect by way of remainder, it cannot take effect by way of executory deviſe. In the caſe of *Purefoy* v. *Rogers*, 2 *Saund.* 388. it was holden; that wherever a remainder is limited upon an eſtate of freehold, which is capable of ſupporting a remainder, the limitation ſhall never be deemed an executory deviſe.

It has been ſaid; that an eſtate in fee is deviſed to the iſſue of *Elizabeth Croſon*. If this were ſo, the deviſe to *Thomas Barnard* and *James Fenton* would certainly be void; becauſe no eſtate can be limited upon a fee: But we are of opinion; that only an eſtate tail is deviſed. An eſtate in fee would certainly have paſſed, by the words in the former part of this will, to the iſſue of *Elizabeth Croſon*: But it appears from ſubſequent words, to be the manifeſt intention of the teſtator, that the iſſue ſhould only take an eſtate tail; and it is a ſettled rule in the conſtruction of a will, that the meaning of former words therein contained may be reſtrained by ſubſequent words.

It has been ſaid; that the remainder deviſed to *Thomas Barnard* and *James Fenton* was contingent; becauſe its taking effect depended upon the contingency of *Elizabeth Croſon*'s dying without iſſue: But we are of opinion; that it was a veſted remainder, and conſequently, that it is not barred by the recovery. If a remainder be limited by a will to a perſon *in Eſſe* at the time of the teſtator's death, it does always veſt *eo inſtante* the teſtator dies; although a contingent remainder, which, if the contingency

Contingency whereupon it depends had happened, would be antecedent thereto, be limited by the ſame will. In the preſent caſe, the remainder to *Thomas Barnard* and *James Fenton* did veſt at the time of *Edward Brogden*'s death; although the remainder to the iſſue of *Elizabeth Croſon* could not veſt; becauſe there was not at that time any child of *Elizabeth Croſon*. The remainder to *Thomas Barnard* and *James Fenton*, in caſe a child had, after the death of *Edward Brogden*, been born of the body of *Elizabeth Croſon*, would have opened, in order to let in the remainder that child: But it would nevertheleſs have continued to be a veſted remainder, and upon the event of the child's dying without iſſue would have ſhut again.

Rex *verſ.* Powell.

An information for the Uſurpation of a franchiſe may be filed, although the franchiſe is ſurrendered.

UPON a rule to ſhew cauſe, why an information in the nature of a *quo warranto* ſhould not be filed, it appeared; that the information was moved for on account of the defendant's having executed the franchiſe of a freeman of a corporation; and that the defendant had ſurrendered the franchiſe before the rule was made to ſhew cauſe.

The rule was made abſolute.

And by the court—It does not appear clearly, that the franchiſe was ſurrendered in the proper manner: But if it were, the defendant, in caſe he had not a right thereto, ought to be puniſhed for the uſurpation. It is neceſſary that there ſhould be, in a caſe like the preſent, a diſclaimer upon record. If there be not, no puniſhment can be inflicted upon the perſon who has uſurped the franchiſe; for the court cannot

cannot ſet a fine for the uſurpation, unleſs there is ſuch a diſclaimer.

Perry *verſ.* Nicholſon.

An award, by which coſts are awarded generally, is good.

UPON a rule to ſhew cauſe, why an award ſhould not be ſet aſide, it appeared; that coſts were awarded; and that the ſum to be paid for coſts was not aſcertained.

The rule was diſcharged.

And by *Ryder* Ch. J.—It has been ſaid; that as the ſum to be paid for coſts is not aſcertained, the award is bad for uncertainty: But the award is not bad on that account; for the ſum to be paid may be aſcertained by the officer of the court, whoſe province it is to tax coſts. In the caſe of *Furnis* v. *Hallom*, 2 *Barn.* 140. it was holden by the court of Common Pleas, in a caſe like the preſent, that the coſts might be taxed by one of the Prothonotaries.

Mitchell *verſ.* Robinſon.

A rule for ſtaying the proceedings in an action, upon the payment of what is due. Refuſed.

A Motion being made to ſtay the proceedings in an action, upon the ground of the action's being below the dignity of the court, an affidavit was offered, in which it was alledged; that the ſum of forty ſhilling is not due to the plaintiff; and it was ſaid, that in the court of Exchequer the proceedings in actions have been frequently ſtaid upon ſuch affidavits.

A rule to ſhew cauſe, why the proceedings ſhould not be ſtaid, was refuſed; the affidavit not being permitted to be read.

And

And by *Denison* J.—This court has always objected to the reading of such an affidavit: But the matter has been sometimes referred to the Master.

An absolute rule was made, for referring it to the master, to see what is due to the plaintiff; and that upon the payment of what is due, with the costs of the action and of this application, the proceedings shall be staid.

Rex *verſ.* Davies.

A Motion was made upon the last day of this term, for a rule to shew cause, why an information in the nature of a *quo warranto* should not be filed.

An information is not to be moved for upon the last day of a term.

The court, upon being informed by the secondary of the Crown Office, that by the practice of court such a rule ought not to be moved for upon the last day of a term, refused to make a rule to shew cause.

But *Denison* J. inclined to be of opinion; that the practice of not moving upon the last day of a term, for a rule to shew cause why an information should not be filed, is confined to an information for a misdemeanor, and does not extend to an information in the nature of a *quo warranto*.

Michaelmas Term,

29 Geo. 2. 1755.

Sir Dudley Ryder, *Chief Juſtice.*
Sir Thomas Deniſon,
Sir Michael Foſter,
Sir John Eardley Wilmot, } *Juſtices.*

Rex *verſ.* Lediard.

An information filed againſt a juſtice of the peace, for improperly diſcharging a priſoner.

UPON a rule to ſhew cauſe, why an information for a miſdemeanor ſhould not be filed, it appeared; that *J. S.* had been committed to priſon by a juſtice of the peace, for ſeducing ſeven workmen in the manufacture of glaſs to go out of this kingdom into a foreign country; that the defendant, who was alſo a juſtice of the peace, had diſcharged *J. S.* upon a recognizance being entered into for his appearance, by which he was himſelf bound in the ſum of one thouſand pounds, and two other perſons in the ſum of five hundred pounds each; that the two perſons were, in fact, worth nothing; and that *J. S.* immediately after his diſcharge, went out of the kingdom.

The

The rule was made abſolute.

And by *Ryder* Ch. J.—It has been ſaid; that the defendant might be ignorant of the poverty of the two perſons who entered into the recognizance; But it was his duty, before he diſcharged the priſoner, to have made a ſtrict enquiry as to their circumſtances. Beſides the defendant's failing in this, the ſum in which the recognizance was entered into, is much too ſmall; the puniſhment, inflicted in ſuch caſe by the 23 *G.* 2. *c.* 13. being a penalty of five hundred pounds, and twelve months impriſonment, for every workman ſeduced.

Drummond and Catharine his wife, adminiſtrators of Aſhe *verſ.* The Duke of Bolton.

The penalty of a bond is not ſaved, although one part of a diſjunctive condition cannot be performed.

AN action of debt being brought upon a bond, in the penalty of ſix thouſand pounds, and *Oyer* being prayed of the bond, the condition, after reciting that a marriage was intended to be had, between the plaintiff *Catharine* daughter to the defendant, who was at that time Lord *Harry Paulet*, and *William Aſhe*, appeared to be; that if the defendant ſhall pay or ſecure to the ſaid *Catharine*, or to her children by the ſaid *William Aſhe*, three thouſand pounds, within ſix months after the defendant ſhall become Duke of *Bolton*, then the obligation to be void.

The defendant pleaded; that *William Aſhe* died without leaving any child born of the body of the plaintiff *Catharine*, before the defendant became Duke of *Bolton*; and that the plaintiff *Catharine* was not with child at the time of the death of the ſaid *William Aſhe*.

Upon a demurrer to this plea, it was holden to be bad.

And by the court—*Laughter's* caſe, 5th Rep. 22. has been cited and relied upon; in which it is laid down, that if the condition of a bond, conſiſting of two parts, be in the disjunctive, and the performance of one part, which, as well as the performance of the other part, was poſſible at the time of entering into the bond, be rendered impoſſible by the act of God, the penalty is ſaved; But we are of opinion, that this doctrine, which does not appear to be laid down by the court, but to be the reaſon given by the reporter for the judgment of the court, is laid down too largely. It is a general rule, that the intention of the parties is to be regarded in the conſtruction of a deed; and it ſeems very reaſonable, that this rule ſhould be obſerved in conſtruing the condition of a bond. If the plaintiff *Catharine*, at the time the defendant became Duke of *Bolton*, had one or more children by *William Aſhe*, it would, perhaps, have been in the defendant's power, to pay the three thouſand pounds to her, or to the child or children: But it never could be the intention of the parties, that the money ſhould not be paid to the plaintiff *Catharine*, in caſe ſhe ſhould not have a child by *William Aſhe*, at the time the defendant ſhould become Duke of *Bolton*. The conſequence of adhering to the doctrine of *Laughter*'s caſe would be, that in caſe the plaintiff *Catharine* had been dead at the time the defendant became Duke of *Bolton*, and ſeveral children of hers by *William Aſhe* had been at that time living, thoſe children would not have been entitled to the money.

Coupland

Coupland *verſ.* Frinbow.

UPON a writ of *error*, brought upon a judgment of the court of Common Pleas by default, the error aſſigned was; that the writ of *enquiry*, which was returnable upon a general return day, ought to have been returnable upon a day certain; the action, which was againſt an attorney, being commenced by bill, and not by original.

A writ of *enquiry* in an action by bill is good, although it be returnable upon a general return day.

The judgment was affirmed.

And by the court—In the caſe of *Launder* v. *Cripps*, *Hil.* 6 *G.* 2. in this court, wherein the ſame matter was aſſigned for error as is done in the preſent caſe, it was holden to be only a miſcontinuance, and that it is cured by the ſtatutes of *Jeofails*.

Rex *verſ.* Ponſonby and Eight Others.

UPON a writ of *error*, brought upon a judgment of the court of King's Bench in *Ireland*, it appeared; that in an information filed in the court of King's Bench in *Ireland*, it was charged; that the defendants had uſurped the franchiſes of free Burgeſſes of the corporation of *Newtown* in *Ireland*; that the plea of the defendant *Ponſonby* and one other of the defendants was, that they were duly elected free burgeſſes, but that they have neither been ſworn free Burgeſſes, nor have executed the franchiſes; and they traverſed the uſurpation; that the plea of the other ſeven was, that they were duly elected free burgeſſes and ſworn, and they likewiſe traverſed the uſurpation; that the replication,

A judgment of *ouſter* cannot be given at the common law, in an information in the nature of a *quo warranto*.

replication as to the plea of the two defendants was, that due notice has been given them of their being elected free burgeſſes, and that they have neglected to be ſworn; and as to the plea of the other ſeven, that by non-reſidence, and neglect of attending and doing their duty as free burgeſſes, they have forfeited their franchiſes, and have ceaſed to be free burgeſſes; that the rejoinder by the two defendants was, that due notice has not been given them of their being elected free burgeſſes; and by the other ſeven, that at all times ſince their being elected and ſworn free burgeſſes, when they were duly ſummoned, and had no lawful excuſe to be abſent, they have attended and done their duty as free burgeſſes; that upon a general demurrer, there was judgment againſt all the defendants; and that part of the judgment was, that the defendants ſhall be ouſted of their franchiſes.

The judgment was, upon great conſideration, reverſed.

And by *Ryder* Ch. J.—The ancient method, of proceeding againſt the uſurper of a franchiſe in a corporation, was by writ of *quo warranto:* But this has been long diſcontinued, and inſtead thereof, the proceeding has been by information in the nature of a *quo warranto.* By the 9 *Ann. c.* 20. it is enacted, "That in caſe any "perſon, againſt whom an information in the "nature of a *quo warranto,* ſhall be filed, ſhall "be found, or adjudged guilty of an uſurpa-"tion or intruſion into, or of unlawfully hold-"ing and executing the franchiſe of burgeſs "of a corporation, it ſhall and may be lawful "for the court, as well to give judgment of "*Ouſter* againſt ſuch perſon from his franchiſe, "as to fine ſuch perſon." Judgment of *Ouſter* had,

had, before the making of this ſtatute, been given in ſome informations in the nature of *quo warranto*'s againſt the perſons found or adjudged guilty of uſurping franchiſes in corporations: but in the caſe of *Rex* v. *Bennett*, *Trin.* 4 *G.* 1. the judges were equally divided in opinion upon the queſtion, Whether judgment of *Ouſter* ought to be given at the common law, in an information in the nature of a *quo warranto*? As the judges were in that caſe equally divided in opinion; and as there has not been ſince any determination upon the point, we are of opinion; that judgment of *Ouſter* ought not to be given in an information in the nature of a *quo warranto*, unleſs the caſe of the perſon found or adjudged to be guilty be within the ſtatute.

We are likewiſe of opinion; that the caſe of the two defendants is not within the ſtatute. As theſe defendants neglected to be ſworn, the corporation might either have compelled them to be ſworn, or might have elected other perſons to be free burgeſſes: But as they were not ſworn, they were never in poſſeſſion of the franchiſes; and conſequently, they could not be liable to a judgment of *Ouſter*, for uſurping or intruding into, or for unlawfully holding and executing the franchiſes.

We are likewiſe of opinion; that the caſe of the ſeven defendants is not within the ſtatute. It is not neceſſary for the court to give an opinion; whether the non-reſidence of the ſeven defendants, and their neglect of attending and doing their duty as free burgeſſes, were *ipſo facto* a forfeiture of their franchiſes; becauſe if that were ſo, the defendants did, upon the forfeiture, ceaſe to be burgeſſes; and conſequently, they could not afterwards be liable

to

to a judgment of *Ouſter*. In Lord *Bruce*'s caſe, *Mich.* 2 *G.* 2. in this court, it was holden; that if a perſon have been guilty of any thing, which amounts to an actual forfeiture of his franchiſe, the franchiſe does thereupon become vacant, and another perſon may be elected in his room.

It has been ſaid; that although the non-reſidence of the ſeven defendants, and their neglect of attending and doing their duty as free burgeſſes, were not *ipſo facto* a forfeiture of their franchiſe, they were a good cauſe of amotion. It is not neceſſary for the court to give an opinion; whether the non-reſidence, and neglect of the defendants were in the preſent caſe a good cauſe of amoving them; becauſe, however that may be, they could not be liable to a judgment of *Ouſter*, until they were actually amoved. They could not be guilty of uſurping or intruding into the franchiſes, becauſe they came lawfully into poſſeſſion thereof; and as they had not only a right to hold the franchiſes, but were bound to do their duty as free burgeſſes, until they were actually amoved, they could not be guilty of unlawfully holding and executing the franchiſes.

It has been ſaid; that the power of amotion may not be given to a corporation by charter, or that, if it be given, the corporation may, from ſome corrupt motive, neglect or refuſe to exerciſe it; and it is inferred, that there muſt ſometimes be a failure of juſtice, unleſs judgment of *Ouſter* can be given in an information in the nature of a *quo warranto*, although there has not been an amotion. It was reſolved in *Bagg*'s caſe, 11 *Rep.* 99. that a man cannot be amoved from his franchiſe in a corporation, before he has been convicted of ſome crime, unleſs the corporation have the power of amotion

tion by charter or preſcription: But it has been holden in divers modern caſes, that the power of amotion is incidental to every corporation. It is not to be intended; that any corporation will, for a corrupt motive, neglect or refuſe to exerciſe its power of amotion; and if a corruption ſhould, from ſuch motive, neglect or refuſe to exerciſe it, yet there would not be a failure of juſtice; in as much as a *Mandamus* may in ſuch caſe be awarded.

It has been ſaid; that although the court ſhould be of opinion, that the caſe of the two defendants, and the caſe of the ſeven, are both within the ſtatute, yet the judgment ought to be reverſed; for that the caſe of the two defendants is ſo different from that of the ſeven, that a joint information in the nature of a *quo warranto* cannot be filed againſt the nine: But as we are of opinion; that neither the caſe of the two defendants, nor the caſe of the ſeven, is within the ſtatute, and conſequently, that the whole judgment muſt be reverſed, it is not neceſſary to give any opinion upon this point.

Rex *verſ.* Grew, Coroner of Middleſex.

IT was found by an inquiſition taken by the defendant; that only the near fore wheel of a waggon did move to the death of a man; and that only the near fore wheel was forfeited as a *Deodand*.

The court ought not to contradict the finding of a jury, as to a matter of fact.

Upon a motion to quaſh the inquiſition, it was ſaid to be exceedingly improbable, if not altogether impoſſible; that only the near fore wheel of a waggon ſhould move to the death of a man.

A rule to ſhew cauſe was refuſed.

And by the court—As the queſtion in this caſe was a queſtion of fact, and the jurors have found, that only the near fore wheel of the waggon did move to the death of the man, the court ought not to quaſh the inquiſition.

Abery *verſ.* Dickenſon.

The books of commiſſioners ought not to be inſpected, unleſs they are parties.

UPON a motion, for a rule to inſpect and take copies of the books of the commiſſions for licenſing hackney coaches, it appeared that the defendant was an officer under the commiſſioners; and that the action, which was an action of treſpaſs, was brought againſt him for taking a diſtreſs, for a penalty inflicted by the commiſſioners upon the plaintiff.

A rule was refuſed.

And by the court—As the commiſſioners are not parties to the action, the plaintiff ought not to have the liberty of inſpecting and taking copies of their books.

Howard *verſ.* Cheſhire.

A certificate upon the 43 *Eliz. c.* 6. holden to be good.

IN a Caſe reſerved in an action of treſpaſs, it was ſtated; that the action was brought for taking a diſtreſs; that the defendant juſtified the taking as agent to general *Cholmondley*, by virtue of a reſervation in a leaſe of land from the general to the plaintiff; that iſſue was joined upon a traverſe of the defendant's being agent to the general; that a verdict, with one penny damages was found for the plaintiff; and that there was a certificate upon the 43 *Eliz. c.* 6.

The

The queſtion was, whether the plaintiff ought to have any more coſts than damages?

It was holden by *Deniſon* J. and *Foſter* J. (*Ryder* Ch. J. and *Wilmot* J. being abſent) that he ought not.

And by *Deniſon* J.—It has been ſaid; that this is not a caſe, in which a certificate ought to be granted upon the 43 *Eliz. c.* 6. an intereſt in land being in queſtion, and the caſe of *Aſſer* v. *Finch*, 2 *Lev.* 234. has been relied upon; in which it was holden, that the plaintiff, for whom a verdict was found upon an iſſue joined on a plea of *extra viam*, was entitled to full coſts. But in that caſe, the extent of the way, and conſequently an intereſt in land, was directly in queſtion; whereas in the preſent caſe, the iſſue is collateral to the plaintiff's intereſt in the land demiſed.

Leathley *verſ.* Webſter.

IN an action for money had and received to the plaintiff's uſe, it was found by a ſpecial verdict; that the company of cutlers in *Hallamſhire* in the county of *York*, which were incorporated by the 21 *Ja.* 1. *c.* 31. have a power given by that ſtatute of making ſuch by-laws as are not contrary to the law of the land; that in the year 1718, the company made a by-law, whereby it is ordered, that the clerk of the company ſhall receive fifteen ſhillings for every pair of indentures of apprenticeſhip which ſhall be inrolled by him, and that it ſhall be referred to the maſter and wardens of the company, to aſcertain how much of the fifteen ſhillings ſhall be deducted for the benefit of the company; and that the clerk of the company had inſiſted upon and received

A by-law which is uncertain, or contrary to a ſtatute, is void.

fifteen ſhillings from the plaintiff for the enrolling of a pair of indentures, by which the plaintiff's ſon was bound an apprentice to a member of the company.

The queſtion was, if this by-law be good?

It was holden, that it is not.

And by *Ryder* Ch. J—The by-law is void for uncertainty; in as much as it does not ſay, how much of the fifteen ſhillings ſhall be deducted for the benefit of the company; but refers it to be aſcertained by the maſter and wardens, how much ſhall be deducted. As it does not moreover appear, that the maſter and wardens have ever aſcertained the ſum to be deducted for the benefit of the company, the clerk had no right to receive any thing on that account. If this by-law were not void for uncertainty, it would nevertheleſs be void; becauſe it is contrary to the 22 *H.* 8. *c.* 4. whereby it is enacted: "that no maſter, wardens, "or fellowſhips of crafts, take from hence"forth of any apprentice, or of any other per"ſon, for the entry of any apprentice into their "fellowſhip, above the ſum of two ſhillings "and ſixpence."

Rex *verſ.* Hellier.

Bail to articles of the peace muſt be put in in this court.

UPON a rule to ſhew cauſe, why a *mandamus* ſhould not be awarded to two juſtices of the peace in the county, to take a recognizance for keeping the peace, it appeared; that articles of the peace had been exhibited in this court; that the defendant was in priſon; and that he was ſo poor, as not to be able to be at the expence of a *Habeas Corpus* for bringing him up to this court.

The rule was diſcharged.

And

And by the court.—It has always been doubted; whether a recognizance for keeping the peace can be taken by juſtices of the peace, upon articles of the peace exhibited in this court. There is only one inſtance of late years, wherein a *mandamus* for taking ſuch a recognizance has been awarded; and in that caſe, which was the caſe of *Rex* v. *Lewis*, *Trin.* 3 *G.* 2. there were very particular circumſtances; namely, that the defendant was ſeventy years of age; and that he was ſo infirm as not to be able to travel.

Rex *verſ.* Griffith.

UPON a motion for an attachment for a reſcue, a feigned iſſue was ordered, to try whether the defendant had been guilty of a reſcue.

The coſts antecedent to the ordering of a feigned iſſue are only to be paid.

A verdict being found for the defendant, the queſtion was whether he ought to have the coſts of the motion, as well as the coſts of the feigned iſſue?

It was holden; that he ought only to have the coſts of the feigned iſſue.

And by the court—There is not any difference betwixt the preſent caſe, and the caſe of a feigned iſſue, ordered upon a rule to ſhew cauſe why an information ſhould not be filed; and it has been frequently holden, that in the latter caſe only the coſts of the feigned iſſue ought to be paid.

Harris

Harris *verſ.* Wakeman.

A cuſtom which extends to the ſuburbs of a city, is good.

UPON a writ of *Error*, brought upon the judgment of an inferior court, it appeared; that in an action of debt, brought into the court of the mayor of *Worceſter*, the plaintiff alledged in his declaration, that he is chamberlain of the city of *Worceſter*; that by a cuſtom of this city no perſon, not being a freeman, ſhall ſell or put to ſale by retail any goods within the ſaid city, or the liberties or ſuburbs thereof; that by another cuſtom the corporation have a power of making by-laws; that a by-law was made, whereby a penalty of four pounds is inflicted upon every perſon not being a freeman, whoſhall ſhew, ſell or put to ſale any goods by retail within the ſaid city, or the liberties or ſuburbs thereof, to be recovered in an action of debt brought in the Mayor's court, in the name of the chamberlain; that one third of the penalty is to be paid to the perſon who ſhall inform, and the other two thirds to the treaſurer of the corporation for the benefit of the poor; that iſſue was joined upon the plea of *nil debet*; that by the *venire facias* awarded twenty-four jurors were to be returned; and that there was a verdict and judgment for the plaintiff.

It appeared likewiſe from a bill of exceptions, that the jurors were freeemen; that the judges were members of the corporation; and that the objections made at the trial upon theſe accounts were over-ruled.

The judgment was, upon great conſideration, affirmed.

And

And by *Ryder* Ch. J.—We are of opinion; that the objection made at the trial to the jurors and judges, were very properly overruled.

It has been ſaid; that a cuſtom of a city, which extends to the ſuburbs of the city, is not good: But we are of opinion; that ſuch a cuſtom is good. In the caſe of *The City of London* v. *Manley*, 1 *Roll. Abr.* 557. it was holden; that the cuſtom of the city of *London*, to have the meetage of coals within the port of *London*, extends from *Staines-Bridge* to *Tendal*. In the caſe of *Fazakerly* v. *Wiltſhire*, *Trin.* 7 *G.* 1. in this court, the authority of the caſe of *The City of London* v. *Manley* was recognized, and it was therein holden; that the cuſtom of the city of *London*, to have the meetage and porterage of corn and ſome other goods within the port of *London*, extends from *Staines-Bridge* to *Tendal*.

It has been ſaid; that the cuſtom, it being in reſtraint of trade, is not good: But we are of opinion; that it is good. In *Waganor*'s caſe, 8 *Rep.* 126. it is laid down; that a cuſtom in reſtraint of trade in a particular place is good.

It has been ſaid; that the cuſtom is not good, becauſe fairs and markets are not excepted: But it is not in our opinion neceſſary that theſe ſhould be excepted in ſuch a cuſtom. In *Waganor*'s caſe, fairs and markets were not excepted, and yet the cuſtom was holden to be good. It does not, moreover, appear to the court; that there are either fairs or markets in the city of *Worceſter*.

It

It has been ſaid; that the penalty inflicted by the by-law is inflicted upon every perſon who ſhall ſhew goods, whereas the cuſtom does only extend to perſons who ſhall ſell or put goods to ſale: But we are of opinion; that the meaning of the word *ſhew*, and of the words *put to ſale*, is the very ſame; and if it were not, a by-law may be good in part.

It has been ſaid; that it is not ſhewn in the preſent action, in what manner the plaintiff was elected or appointed chamberlain, and that it is not ſufficient, for the plaintiff to alledge that he is chamberlain; becauſe this may be alledged by any perſon: But we are of opinion, that it is ſufficient for the plaintiff to alledge that he is chamberlain. In the caſe of *Hollidge* v. *Hungerford*, *Paſch.* 3 *G.* 1. in this court, it was holden; that it is not neceſſary, in an action like the preſent, for the plaintiff to ſhew in what manner he was elected or appointed chamberlain; and the ſame has been ſince holden in divers other caſes.

It has been ſaid; that by the *Venire Facias* awarded in the preſent caſe, twenty-four jurors were to be returned; whereas no more than twelve jurors ought to be returned for the trial of a cauſe in an inferior court: But this, it being only a miſaward of proceſs, is cured by the ſtatutes of *Jeofails*. In the caſe of *Gibſon* v. *Linley*, 1 *Jo.* 357. it was holden; that the awarding of a *Venire Facias*, by which twenty-four jurors were to be returned for the trial of a cauſe in the court of *Newcaſtle*, was not error.

Rex

Rex *verſ.* Stephens.

A writ *de excommunicato capiendo*, holden to be good.

UPON a rule to ſhew cauſe, why a writ of *ſuperſedeas* to a writ *de excommunicato capiendo*, ſhould not be awarded, it appeared, from a *ſignificavit* of a court of delegates, holden in *Ireland*, to the Lord Chancellor of *Great-Britain*, that the court of delegates was impowered by the Lord Chancellor of *Great-Britain*, to hear an appeal of the defendant from a ſentence of the court of the Archbiſhop of *Dublin* in a ſuit concerning a will; that the court of delegates affirmed the ſentence of the Archbiſhop's court, and condemned the defendant in the ſum of three hundred and thirty pounds for coſts; that the defendant had incurred the ſentence of the greater excommunication, by his contempt in not paying the coſts; that the ſentence of the greater excommunication had been duly given and promulged againſt the defendant, by a preſbyter lawfully authorized in that behalf by the court of delegates; and that the defendant had been openly and publickly excommunicated, by the authority of the court of delegates, in the face of the church.

It did likewiſe appear; that upon this *ſignificavit* a writ *de excommunicato capiendo* had been iſſued from the court of chancery in *England*; that the defendant was arreſted thereupon; and that he is now in cuſtody.

The rule was upon great conſideration diſcharged.

And by *Ryder* Ch. J.—It has been ſaid; that the court of delegates ought not to have given ſentence, in as much as, it was only impowered to hear the appeal: But the power of giving

ſentence was incidental to the power of hearing the appeal; and if ſentence could not have been given by the court of delegates, there would have been a failure of juſtice; for the ſuit could not have been remitted to the Archbiſhop's court.

It has been ſaid; that although the court of delegates had a power of giving ſentence, it had not a power to delegate the power of giving ſentence to a preſbyter: But we are of opinion; that the act of the preſbyter, which appears to have been done by the authority of the court, was the act of the court. It is, moreover, recited in the *ſignificavit*, that the ſentence of the greater excommunication was duly given, and a temporal court ought to give credit to every judicial act of an eccleſiaſtical court, in caſe the eccleſiaſtical court had juriſdiction in the matter.

It has been ſaid; that a writ *de excommunicato capiendo* ought not to have been iſſued from the court of Chancery in *England*, upon a *ſignificavit* from a court of delegates in *Ireland*; becauſe there is no communication betwixt the *Engliſh* and the *Iriſh* courts of juſtice: But the court of delegates is not, in the preſent caſe, to be conſidered as an *Iriſh* court of juſtice. By an *Iriſh* ſtatute, liberty is given of appealing from a ſentence of the court of the Archbiſhop of *Dublin* to the King, in his chancery in *England* or in his chancery in *Ireland*; and a power is given by that ſtatute to the Chancellors of *England* and *Ireland*, reſpectively, of appointing delegates for hearing the appeal. If the appeal be to the court of chancery in *England*, the court of delegates may be, and frequently is holden in *England*: But if it be holden, as

was

was done in the preſent caſe, in *Ireland*; yet, as it is holden under an authority derived from the court of Chancery in *England*, it is to be conſidered as an *Engliſh* court.

It has been ſaid; that as the name of the preſbyter, by whom the ſentence was given and promulged, is not mentioned in the *ſignificavit*, the *ſignificavit* is defective; for that, in caſe the defendant ſhould ſubmit to pay the coſts, there is no perſon to whom a writ to abſolve the defendant, or a writ *de cautione admittenda* can be directed: But we are of opinion; that either of theſe writs may and ought to be directed to the court of delegates, and not to the preſbyter by whom the ſentence was given and promulged.

Rex *verſ.* Addington.

UPON a motion to make a rule of *niſi prius* a rule of this court, an affidavit was read, in which it was alledged; that the rule of *niſi prius* was entered into by the attorney for one of the parties, without the conſent of the party or his council.

If an attorney exceed his authority, he muſt anſwer for it to his client.

The rule of *niſi prius* was ordered to be made a rule of this court.

And by the court—If an attorney exceed his authority, and his client be thereby prejudiced, the attorney is liable to make ſatisfaction to the client: But it is a motion of courſe, to make a rule of *niſi prius* a rule of this court.

Anonymous.

An information for hiring a man to marry a *pauper*, who was a cripple.

UPON a rule to ſhew cauſe, why an information ſhould not be filed, it appeared; that the defendant, who was an officer of a pariſh had given a man money to marry a poor young woman, whoſe ſettlement was in the pariſh of which the defendant was an officer, and who was a cripple; whereby the charge of maintaining the young woman was brought upon the pariſh, wherein the huſband's ſettlement was.

The rule was made abſolute.

Howard *verſ.* Cheſhire.

If there be a certificate upon the 43 *Eliz.* c. 6. no coſts are to be paid under the 4 *Ann.* c. 16.

UPON a rule to ſhew cauſe, why the plaintiff ſhould not have the coſts of a plea of juſtification, it appeared; that in an action of treſpaſs the defendant had, with leave of the court, pleaded not guilty, and a juſtification; that iſſues were joined upon both pleas; that there was a verdict for the plaintiff upon both the iſſues, with one penny damages; that the judge had not certified, that the defendant had a probable cauſe to plead the matter pleaded in juſtification; and that there was a certificate upon the 43 *Eliz.* 2. *c.* 6.

The queſtion was whether the plaintiff ought to have the coſts of the plea of juſtification?

It was holden, that he ought not.

And by *Deniſon* J.—It has been ſaid; that, as the iſſue joined upon the plea of juſtification

is

is found for the plaintiff, and the judge has not certified, that the defendant had a probable cauſe to plead the matter therein pleaded, the defendant is entitled under the 4 *Ann. c.* 16. to the coſts of that plea; But the words of that ſtatute are only, that coſts ſhall in ſuch caſes be given at the diſcretion of the court; and it has been reſolved at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.* the plaintiff ſhall not have the coſts of any plea pleaded with leave of the court; although the iſſue thereupon joined be found for him, and the judge have not certified that the defendant had a probable cauſe for pleading the matter therein pleaded.

Hilary

Hilary Term,

29 Geo. 2. 1756.

Sir Dudley Ryder, *Chief Juſtice.*
Sir Thomas Deniſon,
Sir Michael Foſter,
Sir John Eardly Wilmot, } *Juſtices.*

Lee *verſ.* Wallis.

A by-law, reſtraining the number of perſons, out of whom an election is to be made, is not good.

IN an action of *treſpaſs*, for taking and converting the plaintiff's goods, the defendant pleaded; that the inhabitants of the town of *Godalming* were incorporated by a charter from Queen *Elizabeth*, and that a power was given by the charter of making by-laws; that by the charter certain officers called wardens were to be elected out of the inhabitants at large; that a by law was made, whereby it is ordained, that the wardens ſhall be elected out of the court of aſſiſtants; that the court of aſſiſtants are elected out of perſons who have ſerved certain offices, and not out of the inhabitants at large; that a penalty of ten pounds is inflicted by the by-law upon every perſon elected warden, who ſhall refuſe to execute the office; and a power is given

given of levying the penalty, and in caſe it be not paid upon demand, by diſtreſs and ſale of the goods diſtrained; that the plaintiff being elected warden, he refuſed to take upon himſelf the office; that a demand was made of the penalty, which the plaintiff refuſed to pay; and that the goods, for the converting of which the action is brought, were diſtrained and ſold to ſatisfy the penalty.

Upon a demurrer to this plea, the queſtion was, Whether the by-law be good?

It was holden that it is not.

And by *Ryder* Ch. J.—A by-law to reſtrain the number of perſons out of whom an officer may be elected, is not good. In the caſe of *Rex* v. *Tucker*, *Eaſt.* 15 *G.* 2. it appeared; that by the charter a certain officer was to be elected out of four perſons nominated by the burgeſſes at large; and that it was ordered by a by-law, that the four nominees ſhall be aldermen, or that at leaſt one of them ſhall be an alderman. This by-law was holden to be void; and the judgment was affirmed in the houſe of Lords. In the caſe of *Rex* v. *Phillips*, *Trin.* 22 *G.* 2. it was holden; that a by-law to reſtrain the number of electors may be good; in as much as, the inconveniencies, which frequently attend popular elections, may be thereby prevented: But that a by-law to reſtrain the number of perſons, out of whom an election is to be made, is bad, becauſe the conſtitution is thereby narrowed.

This by-law is bad for another reaſon; namely, that it gives a power of ſelling the goods diſtrained, and by ſo doing, renders the diſtreſs irrepleviſable; whereas by the common law, every diſtreſs is repleviſable. By the

the 2 *W & M. c.* 5. a power of ſelling the goods diſtrained for rent in arrear is given: But five days are allowed by that ſtatute for replevying the goods; whereas under this by-law, the goods may be ſold immediately after they are diſtrained.

Berks *verſ.* Maſon.

A new trial granted; becauſe the judge was diſſatisfied with the verdict.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had; *Ryder* Ch. J. before whom the cauſe was tried, reported; that there was evidence on both ſides; but that the evidence, for the party in whoſe favour the verdict is found, was ſo very ſlight, that the jury ought not, in his opinion, to have regarded it: And that the evidence for the other party was very ſtrong; and he concluded with ſaying, that he was diſſatisfied with the verdict.

At a former day, when this rule came on, it was ſaid on ſhewing cauſe; that if there be evidence on both ſides, a new trial ought not to be granted, and the caſe of *Smith* v. *Huggins*, *Mich.* 14 *G.* 2. in this court was relied upon; wherein a new trial was refuſed, although *Lee* Ch. J. reported; that the evidence for the plaintiff, in whoſe favour the verdict was found, was ſlight, and that he had ſummed up ſtrongly for the defendant: The opinion of the court being, that as there was evidence on both ſides, a new trial ought not to be granted.

The matter was at that day ordered to ſtand over, for the chief juſtice to look into his notes, in order to make a fuller report.

After

After the Chief Juſtice had made the above report, it was ſaid in ſupport of the rule; that if the judge declare himſelf to be diſſatisfied with the verdict, it is the conſtant practice to grant a new trial; and nothing was ſaid by the council who had ſhewn cauſe at the former day.

The rule was made abſolute.

Gardiner *verſ.* Atwater.

Words are to be conſtrued by the court as they are generally underſtood.

UPON a motion in arreſt of judgment, in an action upon the caſe for words, it appeared, that there were ſeveral counts in the declaration; that the words in one count were, *Thou art a ſheep-ſtealing rogue, and farmer* Parker *told me ſo*; and that the words in another count were, *Thy character is good for nothing; it ſounds every where, that thou art a ſheep-ſtealer.*

The rule was diſcharged.

And by *Deniſon* J. (*Ryder* Ch. J. being abſent.)—Divers old caſes have been cited, in which it is laid down; that if words can be conſtrued by the court in ſuch ſenſe as not to be actionable, they ought to be ſo conſtrued: but it is at this day ſettled, that words are to be conſtrued by the court in that ſenſe, wherein they are generally underſtood; and there can be no room for doubt, whether the words in the preſent caſe do import a charge of felony.

It has been ſaid; that although the court ſhall be of opinion, that the words, *thou art a ſheepſtealing rogue*, are actionable; yet the plaintiff ought not to have judgment; becauſe

Wilſon *verſ.* Wymonſold.

A plea of *Puis Darrein Continuance* ſet aſide.

UPON a rule to ſhew cauſe, why a plea of *Puis Darrein Continuance* ſhould not be ſet aſide for irregularity, it appeared; that the plaintiff, who ſued as a *Feme Sole*, was married, and that this was pleaded in the plea: but it likewiſe appeared; that the plaintiff was married before the laſt continuance day.

The rule was made abſolute.

And by the Court—As the plaintiff was married before the laſt continuance day, the defendant cannot plead this in a plea of *Puis Darrein Continuance.*

Rex *verſ.* the Inhabitants of Marwood.

A ſett'lement may be gained by being poſſeſſed of, and reſiding forty days in a leaſehold houſe.

IN an order of ſeſſions, it was ſtated; that *Henry Sloper*, father of the *Pauper*'s wife, being poſſeſſed of a houſe in the pariſh of *Kerrleſbury*, for the remainder of a term of ninety-nine years, determinable upon the death of *J. S.* in conſideration of natural love and affection, granted it in the year 1741 to his daughter for life, with remainder to her daughter; that in the grant there was a reſervation of one room for himſelf, and the lord's rent, which was ten ſhillings a year, was to be paid by the grantee; that the *Pauper* and his wife ſoon after entered upon the houſe, and from time to time paid the lord's rent; that they reſided therein till the leaſe was determined by the death of *T. S.* and that no other conſideration was mentioned in the leaſe, than the ſum of twenty ſhillings, and the annual rent of ten ſhillings to be paid to the lord.

The

The queſtion was, whether the *pauper* did gain a ſettlement in the pariſh of *Kenſington*?

It was holden, that he did.

And by *Ryder* Ch. J.—Before the 9 *G.* 1. *c.* 7. a man might gain a ſettlement, by reſiding forty days in a houſe purchaſed by himſelf, how ſmall ſoever the ſum was for which it was purchaſed. By that ſtatute it is provided; "That no perſon ſhall be deemed to gain a "ſettlement in any pariſh, by virtue of any "purchaſe of an eſtate or intereſt in ſuch "pariſh, whereof the conſideration doth not "amount to the ſum of thirty pounds, *bona* "*fide* paid, for any longer time than ſuch "perſon ſhall inhabit in ſuch eſtate." If the *Pauper* had paid any pecuniary conſideration, he would have been a purchaſer of the houſe, although the grant was to his wife: but as he did not, he was not a purchaſer within the meaning of that ſtatute; and conſequently he did gain a ſettlement. Under the word purchaſe, in the large ſenſe of that word, every acquiſition of an eſtate by gift, marriage ſettlement or deviſe, or by any other way, except it be by ſome act of law, is comprehended: but as the 9 *G.* 1. does ſay expreſsly, that a ſettlement ſhall not be gained by purchaſing an eſtate, unleſs the conſideration-money be *bona fide* paid, that ſtatute can only extend to purchaſes for pecuniary conſiderations.

Atherley *verſ.* Evans.

IN an action of *Indebitatus Aſſumpſit*, the plaintiff declared, as executor of *John Coſins*, upon ſeveral promiſes.

A ſimple contract debt is not diſcharged by being allowed in a ſettled account.

The

The defendant pleaded; that after the time of making the promiſes, the plaintiff's teſtator and the defendant accounted together; that upon the ſettling of the account, the defendant was in arrear to the Plaintiff's teſtator in the ſum of twelve pounds; that the defendant afterwards paid the ſaid twelve pounds, to wit, ten pounds, part thereof, to the plaintiff's teſtator during his life, and the remaining two pounds to the plaintiff after his teſtator's death.

Upon a demurrer to this plea, it was holden to be bad.

And by *Ryder* Ch. J.—It has been ſaid; that as the payment of the twelve pounds, which is pleaded ſpecially, might have been given in evidence upon the general iſſue; the plea, as to that part of it, does amount to the general iſſue, and conſequently that it is bad: but it is not univerſally true, that if a matter, which might have been given in evidence upon the general iſſue, be ſpecially pleaded the plea is bad; for infancy, or a releaſe, may be given in evidence upon the general iſſue, and yet either of theſe may be pleaded ſpecially.

We are of opinion, that this plea is bad; becauſe the matter therein alledged, and relied upon, in bar of the action, is not a diſcharge of the original debt. If the defendant had given a bond to the plaintiff's teſtator, in ſatisfaction of the original debt, this, although it would not have been a payment, would have been a diſcharge of the original debt; becauſe, as the original debt was upon ſimple contract, it would have been extinguiſhed by the bond, which is a ſecurity of higher nature;

ture: but it was not extinguiſhed by being allowed in the ſettled account. The caſe of *Milward* v. *Ingram*, 2 *Mod.* 44. *Trin.* 27. *c.* 2. has been cited, and relied upon, in which it was holden; that a ſimple contract debt is extinguiſhed by being allowed in a ſettled account: but in a ſubſequent caſe, *May* v. *King*, 12 *Mod.* 537. *Trin.* 13 *W.* 3. the contrary was holden. In the latter caſe, the authority of the caſe of *Milward* v. *Ingram* was expreſsly denied; and its authority has been ſince frequently denied.

Eaſter Term,

29 Geo. 2. 1756.

Sir Dudley Ryder, *Chief Juſtice.*

Sir Thomas Deniſon,
Sir Michael Foſter,
Sir John Eardley Wilmot, } *Juſtices.*

Standen on the Demiſe of Wheatly *verſ.* Hall.

If a cauſe be made a remanet at one aſſize, the coſts of that aſſize follow the verdict.

UPON a rule to ſhew cauſe, why the defendant ſhould not have the coſts of two aſſizes, it appeared; that at the firſt aſſize, the cauſe was made a *Remanet* by the order of the judge; and that at the next aſſize, there was a verdict for the defendant.

The rule was made abſolute.

And by the court—It has been ſaid; that in the Court of Common Pleas, only the coſts of the latter aſſize are in ſuch caſe allowed: but it is the practice of this court to allow the coſts of both aſſizes.

Weſton

Weſton *verſ.* Donelly.

If leſs than forty ſhillings be recovered, the plaintiff is in ſome caſes liable to coſts.

UPON a rule to ſhew cauſe, why the plaintiff, who had obtained a verdict, ſhould not pay coſts to the defendant, it appeared; that at the time of commencing the action, the defendant was reſiant in the borough of *Southwark*; that the borough of *Southwark* is within the juriſdiction of the Court of Requeſts, erected by the 22 *G.* 2. *c.* 47. that the plaintiff had alledged in his declaration, that the ſum which is due to him from the defendant was more than forty ſhillings; and that the verdict was for only thirty ſhillings.

The queſtion was, whether the plaintiff be liable to coſts?

It was holden that he is; and, in order to authoriſe the maſter to tax coſts for the defendant, a rule was made for entering the following ſuggeſtion upon the plea roll; namely, that no more than thirty ſhillings was recovered; and that at the time of commencing the action, the defendant was reſiant in the borough of *Southwark*, and was liable to be ſummoned before the Court of Requeſts for the town and borough of *Southwark* in the county of *Surry*.

And by *Ryder* Ch. J.—It has been ſaid; that, the words of the 22 *G.* 2. *c.* 47. being, "that, if in any action *the debt to be recovered* "by the plaintiff doth not amount to forty "ſhillings, the plaintiff ſhall pay coſts to the "defendant;" the plaintiff is not liable to coſts; for that, as he has alledged in his declaration, that the ſum due to him from the

defendant, was more than forty ſhillings, *the debt to be recovered* in the action did amount to forty ſhillings: but we are of opinion; that as the plaintiff did not obtain a verdict for forty ſhillings, he is liable to coſts. In the 3 *Ja.* 1. *c.* 15. by which a court was erected for the recovery of ſmall debts within the city of *London*, the words are, *the debt to be recovered:* yet the conſtruction has always been, that if the defendant be reſiant within the city of *London*, the plaintiff, in caſe he bring an action in one of the ſuperior courts, is liable to coſts, unleſs he obtain a verdict for forty ſhillings.

The Maſter and Wardens of the Society of Innholders in London *verſ.* Gledhill.

A by-law, compelling a perſon to accept the livery of a company, muſt ſhew that the company have a livery.

IN the declaration in an action of debt, for the penalty of five pounds inflicted by a by-law, it was alledged; that the ſociety of innholders was incorporated by a charter from king *Charles* the ſecond; that by the charter a power was given of making by-laws, and of inflicting penalties for the breach thereof; that a by-law was made, by which it was ordained, that every perſon, being a freeman of the company, who ſhall be elected upon the livery, ſhall accept the livery and cloathing, and upon ſo doing pay a fine of ten pounds; or upon a refuſal to accept the livery and cloathing, ſhall forfeit the ſum of five pounds to the maſter and wardens, to the uſe of the maſter, wardens and ſociety, the penalty to be ſued for by the maſter, wardens and ſociety, in any of the king's courts; that the defendant, being a freeman of the company, was elected upon the livery; that due notice was given him of his being elected; that

that he refuſed to accept the livery and cloathing; and that he has not paid the penalty of five pounds.

Upon a general demurrer to this declaration, the queſtion was, whether it be good?

It was holden that it is not.

And by *Ryder* Ch. J.—A by-law of a corporation, whereby a penalty is inflicted upon ſuch a member of the corporation, as does not pay obedience to the by-law, is good: but we are of opinion, that this declaration is not good; becauſe it is not therein alledged, that the company of innholders has a livery. It has been ſaid; that in divers acts of parliament, the livery of many companies in *London* is mentioned as a thing well known; but it is very certain, that ſome companies in *London* have no livery; and the court cannot intend, that the company of innholders is one of the companies which has a livery.

It has been ſaid; that the want of its being alledged in the declaration, that the company have a livery, is a matter of form, which cannot be taken advantage of upon a general demurrer: but we are of opinion; that this is traverſable, and might have been put in iſſue; and conſequently, that it is a matter of ſubſtance.

Foſter J. concurred with *Ryder* Ch. J. and *Deniſon* J. in the above opinion; and he added; that the declaration is, in his opinion, bad upon another account; namely, that it is therein alledged, that the defendant is a freeman of a company, whereas it ought to have been alleged, that the Defendant is a freeman of the city of *London*; becauſe any perſon, who keeps

an inn within the diſtance of three miles from the city of *London*, may, by the charter of this company, be a freeman of the company, although he be not a freeman of the city of *London*.

Wilmot J. concurred in opinion with the other Juſtices; and likewiſe with *Foſter* J. in the objection made by him to the declaration.

Rex *verſ.* Davis.

A collector of rates for the repair of a highway is a pariſh officer.

UPON a rule to ſhew cauſe, why a conviction, and an order of ſeſſions affirming it, ſhould not be quaſhed, it appeared; that *J. S.* had proſecuted *J. N.* for ſtealing a horſe in the pariſh of *St. Leonard's, Shoreditch*; that *J. N.* was convicted; that *J. S.* obtained a certificate under the 10 & 11 *W.* 3. *c.* 23. that the certificate was duly inrolled, and aſſigned to the defendant; that *J. S.* was afterwards appointed a collector of the rates, made purſuant to the 22 *G.* 2. *c.* 30. for the better repairing of the highways in the pariſh of *St. Leonard's, Shoreditch*; that upon the refuſal of *J. S.* to take upon himſelf that office, he was, notwithſtanding his production of the certificate and aſſignment, convicted by a juſtice of the peace in the penalty of ten pounds, inflicted by the 22 *G.* 2. and that, upon an appeal to the quarter ſeſſions, the conviction was affirmed.

The rule was made abſolute.

And by *Ryder* Ch. J.—By the 10 & 11 *W.* 3. it is enacted, "that every perſon who ſhall "apprehend and proſecute any perſon guilty "of any of the felonies therein mentioned, "until he or ſhe ſhall be convicted, ſhall have "a cer-

" a certificate, certifying within what pariſh " the felony was committed; that the certi- " ficate may be once aſſigned over, and no " more; and that the original proprietor of " the certificate, or the aſſignee of the ſame, " by virtue thereof, ſhall be diſcharged from " all and all manner of pariſh and ward offices, " within the pariſh or ward wherein the fe- " lony ſhall be committed."

It has been ſaid; that as the appointment to this office is by the truſtees of the turnpike, it is not a pariſh office: but the office is to be executed in the pariſh; and conſequently it is a pariſh office.

It has been ſaid; that the office, it being that of collector of rates at a turnpike, is a new office, which has been created long ſince the 10 & 11 *W.* 3. and conſequently, that it cannot be an office within the meaning of that ſtatute: but the office is not to be conſidered as a new office, it being no more than a new regulation in the ancient office of ſurveyor of the highways.

The other juſtices concurred in opinion with the chief juſtice; and *Deniſon* and *Foſter* J. added; that, if the office were a new office, the defendant would, in their opinion, be exempted from ſerving it; for that, as the certificate was intended to be a reward, for the apprehending and proſecuting of felons, the ſtatute ought to have a liberal conſtruction.

Rex

Rex *verſ.* Beaumont.

A court of quarter ſeſſions has not juriſdiction of perjury.

UPON a rule to ſhew cauſe, why an indictment ſhould not be quaſhed, it appeared; that the indictment was for perjury; and that it was found at a court of quarter ſeſſions.

The rule was made abſolute: but it was ordered to be inſerted in the rule, that the indictment was quaſhed; becauſe a court of quarter ſeſſions has not juriſdiction of the offence of perjury.

Rex *verſ.* Severn and Arnold.

An appointment of overſeers of the poor for a precinct is void.

UPON a rule to ſhew cauſe, why an appointment of overſeer of the poor ſhould not be quaſhed, it appeared; that the defendants were appointed, by two juſtices of the peace, overſeers of the poor within the precinct of the tower, otherwiſe called the pariſh of *St. Peter's ad Vincula*, within his majeſty's tower of *London*; and that they were appointed under the 43 *Eliz. c.* 2. and not under the 13 & 14 *C.* 2. *c.* 12.

The rule was made abſolute.

And by *Deniſon* J.—We are of opinion; and the late (F) chief juſtice did concur in this opinion, that the appointment of the defendants to be overſeers of the poor is void. It does expreſsly appear, to be an appointment under the 43 *Eliz.*: but it is not a good appointment under that ſtatute, or under the 13 & 14 *C.* 2. The former of theſe ſtatutes does only give a power of appointing overſeers

(F) The late Chief Juſtice died upon the twenty-fifth day of *May*; this judgment was given upon the thirty-firſt day of that month.

of

of the poor in pariſhes; and this power is by the latter ſtatute only extended to townſhips and vills: and we are of opinion; that both theſe ſtatutes, which have in other inſtances been conſtrued ſtrictly, ought to be ſo conſtrued in the preſent caſe. In the caſe of *Rex* v. *Curle and others*, *Mich.* 20 *G.* 2. it was holden; that the very words *ſubſtantial Houſeholders*, which are the words of the 43 *Eliz.* muſt be uſed in an appointment of overſeers of the poor; and an appointment, wherein the perſons appointed were called *principal inhabitants*, was quaſhed: and the ſame ſtrictneſs in conſtruing this ſtatute has been obſerved in divers other caſes.

It has been ſaid; that, as the place of which the defendants were appointed overſeers, is called the pariſh of *St. Peter's ad Vincula*, within his majeſty's tower of *London*, as well as *precinct of the tower*, it is a pariſh by reputation, and the caſe of *Hilton* v. *Pawle*, *Cro. Car.* 92. has been cited, in which it was holden; that a pariſh is within the meaning of the 43 *Eliz.*: but although a place may be a pariſh by reputation, and although overſeers of the poor may be appointed for ſuch place; yet an appointment of overſeers for ſuch place will be bad, unleſs the place be therein expreſsly called a pariſh. In the preſent caſe, the deſcription of the place is, *precinct within the tower*; for the words, *Pariſh of St. Peter's ad Vincula, within his majeſty's tower of London*, are under an otherwiſe called; and the rule in ſuch caſes is, that the name or deſcription which precedes an *otherwiſe called*, is always to be conſidered as the true name or deſcription, and not the name or deſcription which follows. In an anonymous caſe, 3 *Bulſtr.*

Bulſtr. 296. it is ſaid, that the whole court was clearly of opinion; that the true name of a man is that which does precede an *Alias Dictus*, and an indictment was in that caſe quaſhed, becauſe the addition of the perſon indicted followed the *Alias Dictus*.

It has been ſaid; that, although the place, of which the defendants were appointed overſeers be not a pariſh, the court may intend that it is a townſhip or vill, within the meaning of the 13 & 14 *C.* 2. But, as it is not expreſſly called a townſhip or vill in the appointment, the court ought to intend that it is a townſhip or vill, in order to make an oppointment good which is not warranted by that ſtatute.

Rex *verſ.* Alderton.

If the words in an advertiſement are not libellous, without the help of an innuendo, the advertiſement is not a libel.

UPON a rule to ſhew cauſe, why judgment ſhould not be arreſted in an information for a libel, it appeared; that an advertiſement had been publiſhed by the defendant, wherein, after reciting divers prior advertiſements, ſigned by the clerk of the peace for the county of *Suffolk*, relative to the diſtemper amongſt the horned cattle, and mentioning divers orders, made for collecting and diſtributing of money on account of that diſtemper, it was ſaid; that by thoſe orders the money collected had been improperly applied.

In the information, which was for this advertiſement, it was charged to be a libel upon the juſtices of the peace for the county of *Suffolk*; and as often as any particular order was mentioned in the information, there was this *innuendo*, meaning *an order of the juſtices of the peace for the county of Suffolk*.

The

The rule was made abſolute.

And by *Deniſon* J.—We are of opinion, and the late chief juſtice did concur in this opinion, that the advertiſement is not a libel upon the juſtices of the peace for the county of *Suffolk*. It does not appear, without the help of the *innuendo's*, that the orders, mentioned in the advertiſement, were the orders of the juſtices of the peace for the county of *Suffolk*; and if the advertiſement be not in itſelf a libel upon the juſtices, it cannot be made ſo by the *innuendo's*. In the caſe of *Barham* v. *Netherfall*, *Yelv.* 21. which was an action for words, it was alledged in the declaration; that the defendant had ſpoken the following words: *J. Barham hath burnt my barn*, innuendo, *my barn full of corn*. Judgment was in this caſe arreſted; and by the court, the words, *hath burnt my barn*, are no ſlander, this being only a treſpaſs, and the *innuendo* ſhall not help the matter. It is the nature of an *innuendo* to explain doubtful words, where there is matter ſufficient in the declaration to maintain the action: but no words, produced by the *innuendo*, ſhall make the action maintainable. In the caſe of *Rex* v. *Greepe*, *Salk.* 513. the charge in an indictment for perjury was; that the defendant had ſworn, that *J. S.* was upon a certain day at *Newnham*, *innuendo*, at *Newnham* in *Devonſhire*; whereas in truth *J. S.* was not at *Newnham* aforeſaid upon that day. Judgment was in this caſe arreſted; and by the court, *Newnham* may as well mean *Newnham* in any other county, as *Newnham* in the county of *Devon*. An *innuendo* may explain and apply preceding words: but it cannot add to, enlarge, or change the ſenſe of preceding words.

It has been ſaid; that it may, after a verdict, be intended, that the orders mentioned in the advertiſement were proved, at the trial, to be the orders of the juſtices of the peace for the county of *Suffolk*: but as this is not alledged, the court cannot intend that it was proved; becauſe there was no neceſſity of proving it. In the caſe of *Buxenden* v. *Sharp*, *Salk.* 662. which was an action upon the caſe for keeping a bull accuſtomed to run mad, it was not alledged in the declaration, that the defendant knew the bull was accuſtomed to run mad. It was holden, that the defect of alledging this is not cured by a verdict; and by the court, as it was not neceſſary for the plaintiff to prove, at the trial, that the defendant knew the bull was accuſtomed to run mad, it cannot be intended, that this was proved.

Rex *verſ.* The Juſtices of the Peace for the County of Weſtmoreland.

A *mandamus* to juſtices of the peace for hearing an appeal.

UPON a rule to ſhew cauſe, why a *Mandamus* ſhould not be awarded, for the hearing of an appeal, it appeared; that there was an appeal from an order of two juſtices to a quarter ſeſſions of the county of *Weſtmoreland*; that at this quarter ſeſſions the appeal was adjourned to the next quarter ſeſſions, and an order was made, that the matter ſhould, in the mean time, be referred to one of the judges of aſſize; that nothing was done in the matter by the judge of aſſize, to whom it was referred; and that at the quarter ſeſſions, to which the appeal was adjourned, the court refuſed to hear the appeal, and did not adjourn it to any other quarter ſeſſions.

A peremptory *Mandamus* was awarded; by which the juſtices of the peace, for the county of

of *Weſtmoreland*, were commanded to hear the appeal at the next quarter ſeſſions.

And by the court—It has been ſaid; that as the appeal was not adjourned from the laſt to the next quarter ſeſſions, it is now at an end: but it will be incumbent upon the juſtices, who ſhall be at the next quarter ſeſſions, to conſider well, whether the neglect of the laſt quarter ſeſſion to adjourn the appeal, will be an excuſe for their not obeying the *Mandamus* of this court.

Rex *verſ.* the Inhabitants of Kingſwood.

A perſon is not to be removed, until he becomes chargeable to the pariſh, in which he reſided under a certificate.

IN an order of ſeſſions it was ſtated; that *Abraham Turner*, the father of the *Pauper*, whoſe ſettlement was in the pariſh of *Kingſwood*, together with his wife *Anne*, reſided many years in the pariſh of *Wickwar*, under a certificate from the officers of the pariſh of *Kingſwood*, addreſſed to the officers of the pariſh of *Wickwar*; that, during their reſidence under the certificate, the *Pauper* was born; that the *Pauper* lived with her father and mother, in the pariſh of *Wickwar*, till the death of her father, and afterward lived with her mother, in that pariſh, without gaining any ſettlement; that about nine years ago, the *Pauper*, being afflicted with the ſmall pox, was removed into a houſe, provided by the pariſh officers of *Wickwar*, for the reception of perſons, *Paupers* of *Wickwar*, afflicted with the ſmall pox; that ſhe was provided for, in common with other *Paupers* ill of the ſame diſtemper in that houſe, until ſhe was recovered, by *J. S.* an inhabitant of *Wickwar*, but not a pariſh officer; that *J. S.* declared afterwards, that he was paid the expence he had been at on account of the *Pauper*, but did not ſay by whom; that, during all the time

the *Pauper* was in that houſe, her mother rented a houſe in the pariſh of *Wickwar*, in which the *Pauper* might have lived, if ſhe had not been removed as aforeſaid, in order to prevent the ſpreading of the ſmall pox; that the *Pauper*, ſince her recovery from the ſmall pox, has lived with her mother in the pariſh of *Wickwar*, and ſupported herſelf by her own labour; that the *Pauper* was lately removed, by an order of two juſtices, to the pariſh of *Kingſwood*; and that the order was affirmed upon an appeal to the quarter ſeſſions.

The queſtion was, Whether the *Pauper* was liable to be removed to the pariſh of *Kingſwood?*

It was holden, that ſhe was not.

And by the court—The *Pauper*, at the time of the removal, reſided in the pariſh of *Wickwar* under a certificate; and conſequently, ſhe was not liable to be removed to the pariſh of *Kingſwood*, unleſs ſhe did become chargeable to the pariſh of *Wickwar*. If it had appeared; that the expence, incurred upon the *Pauper*'s account, when ſhe had the ſmall pox, was defrayed by the pariſh of *Wickwar*, it would have been a queſtion; whether that was a becoming chargeable, for which the *Pauper* and her mother were liable to be removed to the pariſh of *Kingſwood?* There would likewiſe, in that caſe, have been another queſtion; namely, Whether the *Pauper*, who had, during the nine years preceding the removal, ſupported herſelf, was liable to be removed to the pariſh of *Kingſwood*, on the account of her having been chargeable ſo long before? But as it does not appear, that *J. S.* was reimburſed the expence he was at on account of the *Pauper* by the pariſh of *Wickwar*,

we

we are of opinion; that, at the time ſhe was removed, ſhe was not liable to be removed to the pariſh of *Kingſwood*.

Cope *verſ.* Marſhall.

UPON a rule to ſhew cauſe, why the plaintiff ſhould not have leave to amend his replication, it appeared; that iſſue was joined upon the replication; that the record was entered at an aſſize; and that it was made a *remanet* for defect of jurors.

An amendment allowed, after the cauſe was made a *remanet*.

The rule was made abſolute.

And by *Deniſon* J.—In the caſe of *Dryden* v. *Langley*, *Trin.* 24 *G.* 2. in the court of common pleas, leave was given to amend after iſſue had been ſome time joined; and it ſeems to be reaſonable, that, if the juſtice of the caſe require it, leave ſhould be given to amend, after a cauſe has been entered at an aſſize and made a *remanet*.

Rex *verſ.* The Inhabitants of Bradenham.

IN an order of ſeſſions, it was ſtated; that *J. S.* and his wife and children were removed, in *December* 1754, by an order of two juſtices, from the pariſh of *Thame* to the pariſh of *Bradenham*, and that this order, upon an appeal to the quarter ſeſſions, was reverſed; that ſoon after *J. S.* ran away from his family; that thereupon his wife and children were removed by another order of two juſtices from the pariſh of *Thame* to the pariſh of *Bradenham*, and that this order, upon an appeal to the quarter ſeſſions, was affirmed.

An order of ſeſſions not permitted to be amended.

After

After a rule had been obtained, to ſhew cauſe why the two orders of the juſtices, and the ſecond order of ſeſſions ſhould not be affirmed, another rule was obtained, to ſhew cauſe why the firſt order of ſeſſions ſhould not be amended.

The latter rule was obtained upon an affidavit; wherein it was alledged, that the firſt order of the juſtices was reverſed by the quarter ſeſſions; becauſe it was not therein ſtated, that *J. S.* and his wife and children, were likely to become chargeable to the pariſh of *Thame*; and that the clerk of the peace had, by miſtake, entered a general order of reverſal.

This rule, although no affidavit was read upon ſhewing cauſe thereto, was diſcharged.

And by *Deniſon* J.—The court cannot make this rule abſolute, without giving credit to an affidavit which is contradictory to a record; and it would be of the moſt dangerous conſequence, as well as contrary to an eſtabliſhed rule of law, to give credit to ſuch affidavit. If the clerk of the peace did make a miſtake in entering the order of reverſal, it is a hardſhip upon the pariſh of *Thame*: but the court ought never to depart from a general rule of the law, for the ſake of relieving from a particular hardſhip.

At a ſubſequent day, the former rule was made abſolute.

And by *Deniſon* J.—As the firſt order of removal was quaſhed upon the merits, the ſecond order of removal ought not to have been made. It has been ſaid; that *J. S.* might have

have gained a ſettlement in the pariſh of *Bradenham*, after the making of the firſt order of removal, or that the pariſh of *Bradenham* might be his wife's own ſettlement before marriage: but if either of theſe things were ſo, it ought to have been ſtated, in the ſecond order of removal, or in the ſecond order of ſeſſions. In the caſe of *Alderton* v. *Felixtowe*, *Vin. Remov.* 467. it was holden, in a caſe like the preſent; that it cannot be intended, that a ſettlement was gained after the making of the firſt order of removal.

And by *Foſter* J.—It appears, from a manuſcript note, in my poſſeſſion, of the caſe of *Honiton* v. *St. Mary-Axe*, *Mich.* 9 *Ann.* to have been holden in that caſe; that if an order of removal be quaſhed upon the merits, it is concluſive upon the pariſh removing, as to the pariſh to which the removal was; and that if an order of removal be affirmed upon the merits, it is concluſive upon the pariſh to which the removal was, not only as to the pariſh removing, but as to all other pariſhes.

Rex *verſ.* the Inhabitants of St. Peter's in Nottingham.

IN an order of ſeſſions, it was ſtated; that during the reſidence of *J. S.* in the pariſh of *St. Peter's* in *Nottingham*, under a certificate from the pariſh of *Beeſton*, addreſſed to the pariſh of *St. Peter's*, the *Pauper* was bound to him as an apprentice; that after the *Pauper* had ſerved ſome time in the pariſh of *St. Peter's*, *J. S.* removed to the pariſh of *St. Mary*; and that the *Pauper* went with *J. S.* and ſerved him in that pariſh about a year.

An apprentice to a certificate man may gain a ſettlement in any pariſh, except that to which the certificate is addreſſed.

The

The queſtion intended to have been made was, whether the *Pauper* did gain a ſettlement in the pariſh of *St. Mary's*?

But the caſe of *Rex* v. *High and Low Biſhopſide*, *Trin.* 28 & 29 *G.* 2. being cited, wherein it was holden; that an apprentice to a certificate-man may gain a ſettlement in any pariſh, except that to which the certificate is addreſſed, it was admitted; that the *Pauper* did gain a ſettlement in the pariſh of *St. Mary's*.

Trinity

Trinity Term,

29 & 30 Geo. 2. 1756.

Sir Thomas Deniſon,
Sir Michael Foſter,
Sir John Eardley Wilmot, } *Juſtices.*

MEMORANDUM. There was in this term no chief juſtice. Sir *Dudley Ryder*, the late chief juſtice, died during the laſt term; and lord *Mansfield*, who ſucceeded as chief juſtice, was not appointed until the next term.

Buſh *verſ.* Ralling.

UPON a rule to ſhew cauſe, why a new trial ſhould not be had in an action upon the 2 *G.* 2. *c.* 24. it appeared; that the action was brought for the penalty given by the ſeventh clauſe of that ſtatute, whereby it is enacted, "That if any perſon, by himſelf or "any perſon employed by him, ſhall by any "gift or reward, or by any promiſe, agree-"ment or ſecurity, for any gift or reward, "corrupt or procure any perſon to forbear "to give his vote in any election of a member "of parliament, ſuch perſon ſhall forfeit the

The giving of money to forbear to vote, is an offence within the meaning of the 2 G. 2. c. 24.

" ſum of five hundred pounds:" that it was alledged in the declaration, that the defendant, whilſt *Ralph Thrale*, Eſq; was a candidate for being a member of parliament for the borough of *Abingdon*, did corrupt *John Harvey* to forbear to give his vote for the ſaid *Thrale*, by giving the ſaid *Harvey* the ſum of twenty guineas; that at the trial of the cauſe, it was ruled by *Foſter* J. that *Harvey* was a competent witneſs; that the evidence of *Harvey* was, that the defendant did give him the ſum of twenty guineas, to forbear to vote for *Thrale*, but that *Harvey* did, even at the time of taking the twenty guineas, intend to vote for *Thrale*, and did afterwards vote for him; and that there was a verdict for the plaintiff.

The rule was diſcharged.

And by *Deniſon* J.—We are of opinion, and the late chief juſtice did concur in this opinion; that a new trial ought not to be granted. Two objections have been made to the competency of *Harvey* to be a witneſs; namely, that he was a *Particeps Criminis*, and that the tendency of his evidence was to diſcharge himſelf from penalties and diſabilities. It would, perhaps, be a full anſwer to theſe objections to ſay, that a *Particeps Criminis*, although the tendency of his evidence be to obtain a pardon, or even a reward for himſelf, is, in divers caſes a competent witneſs: but another anſwer, deducible from a clauſe of the ſtatute upon which the preſent action is brought, may be given. By *par.* 8. of that ſtatute it is enacted, " That if any perſon " offending againſt this act ſhall, within twelve " months after the election of a member of " parliament, diſcover any other perſon " offending againſt this act, ſo that ſuch per-

" ſon

" ſon ſo diſcovered be thereupon convicted, " ſuch perſon ſo diſcovering, and not having " been before convicted of any offence againſt " this act, ſhall be indemnified and diſcharged " from all penalties and diſabilities, which " he ſhall then have incured by an offence " againſt this act." This ſeems to be a legiſlative declaration, that one perſon, offending againſt this act, may be a witneſs againſt another offending againſt it; for it is not probable, that the legiſlature ſhould intend to diſcharge one offender againſt this act from all penalties and diſabilities, upon diſcovering another offender againſt it, in ſuch a manner that the latter be convicted, without intending at the ſame time, that the former ſhould be a witneſs againſt the latter.

In the caſe of *Phillips* v. *Fowler*, it was ruled at *Niſi Prius*, by *Eyre* C. J. of the Court of Common Pleas, that *Hoare*, to whom money had been given to forbear to vote for a candidate, was a competent witneſs againſt the giver of the money, in an action for the penalty given by the 2 *G.* 2. *c.* 24. and it was ſaid by the Ch. J. that unleſs the evidence of the taker of the money, notwithſtanding he is a *Particeps Criminis*, be in ſuch caſe admitted, the ſtatute will be of very little avail. A new trial was indeed granted in that caſe: but, as it appears from 1 *Barn.* 326. that the new trial was granted upon account of the jurors having determined, as to the finding of their verdict, by caſting lots, it may fairly be inferred; that the opinion of the Ch. J. as to the competency of *Hoare* to be a witneſs, was acquieſced under.

It has been ſaid; that as *Harvey*, even at the time of taking the money, intended to

vote for *Thrale*, there was no aſſent of his mind to the propoſal of forbearing to vote, and conſequently, that the defendant did not corrupt him to forbear to vote: but we are of opinion; that, whatever the intention of the taker of the money is, at the time of taking it, the offence of corrupting is complete, as to the giver of the money, by giving it to forbear to vote for a candidate; and that it would be a very narrow conſtruction of a ſtatute, which was intended to prevent every mode and ſpecies of corruption, to hold; that, becauſe the mind of *Harvey* did not aſſent to the propoſal of forbearing to vote, the defendant, who, by giving the money did all that was in his power to corrupt *Harvey*, was not guilty of corrupting him.

It has been ſaid; that although the words, *unlawfully procure or ſuborn*, in the 5 *Eliz. c.* 9. are in the disjunctive, the conſtruction has been, that the offence of ſubornation of perjury cannot be, unleſs there has been a perjury; and it is inferred; that although the words, *corrupt or procure*, in the 2 *G.* 2. *c.* 24. are in the disjunctive, the conſtruction ought to be, that the offence of corrupting to forbear to vote cannot be, unleſs there has been a forbearing to vote: but there is a wide difference betwixt the two caſes. The word *ſuborn*, in the former ſtatute, which is a technical word, means the ſame as *unlawfully procure*; and conſequently, unleſs there be an unlawful procuring, there cannot be a ſuborning: but the meaning of the word *corrupt*, in the latter ſtatute, is different from that of the word *procure*; and conſequently, there may be a corrupting, although there be not a procuring. It does moreover ſeem to have been the intention of the 2 *G.* 2. *c.* 24. to make the giving of

of money to forbear to vote an offence, although there be not a forbearing to vote; for the taker of money to forbear to vote is liable to all the penalties and diſabilities of that ſtatute, although he do not forbear to vote; and it is not to be conceived, that the legiſlature did mean, to inflict a more ſevere penalty upon the perſon who takes money to forbear to vote, than upon the giver of the money.

There is another reaſon why the conſtruction of 2 *G.* 2. *c.* 24. ought to be, that the offence of corrupting to forbear to vote may be, although there is not a forbearing to vote; namely, that if the conſtruction ſhould be otherwiſe, an action can never be maintained upon that ſtatute againſt the giver of money to forbear to vote, if the taker of the money die before the election.

Pearce *verſ.* Davy.

A dilatory plea ſet aſide, becauſe it was not verified by affidavit.

UPON a rule to ſhew cauſe, why a dilatory plea ſhould not be ſet aſide, it appeared; that the affidavit was not poſitive as to the truth of the fact pleaded; but there was ſomething alledged in the affidavit, from whence it might fairly be inferred, that the fact pleaded is true.

The rule was made abſolute. *Deniſon* J. and *Wilmot* J. being of opinion, that the affidavit is not ſufficient.

And by *Deniſon* J.—It has been ſaid; that it is ſufficient under the 4 *Ann c.* 16. if any matter be ſhewn to the court by affidavit, to induce them to believe, that the fact of the plea is true: but the conſtruction has always been; that the affidavit muſt be poſitive as to every matter of fact; for that the words probable matter, in that ſtatute, do only extend

to

to a matter of record, or to ſome other collateral matter, as to the truth of which there cannot be a poſitive affidavit.

Foſter J. inclined to be of opinion, that the affidavit is ſufficient; in as much as, it may be fairly concluded from what is therein alledged, that the fact pleaded is true.

Griffith *verſ.* Hollier.

An amendment allowed after two terms, by which the *Venue* was changed.

UPON a rule to ſhew cauſe, why the declaration ſhould not be amended, by ſtriking out the word *Worceſterſhire*, and inſerting the word *Oxfordſhire*, it appeared; that the action had been commenced more than two terms; and that the conſequence of the amendment would be changing the *Venue*.

The rule was made abſolute.

And by *Deniſon* J.—As the amendment, intended to be made, is an amendment at the common law, for the making of which no time is limited, the court may give leave to make it, notwithſtanding the action has been commenced more than two terms, and the conſequence of the amendment will be the changing of the *Venue*.

It has been ſaid; that as it does appear, from the affidavit, upon which the rule to ſhew cauſe was made, when the bill was filed, it may have been filed merely to have ſomething to amend by: but the court will not, in a caſe like the preſent, inquire into the time of filing the bill; it being ſufficient for the purpoſe of amending, that a bill is filed.

It

It has been ſaid; that if the amendment intended ſhould be allowed in the preſent action, which is an action upon a ſtatute againſt a carrier, the pendency of the preſent action, which may have been brought colluſively by a friend to the defendant, may be pleaded in bar to a ſubſequent action brought *bona fide* in the county of *Oxford*; the conſequence of which will be an eluſion of the ſtatute. If ſuch colluſion did appear, the court would actually refuſe to give leave to amend: but the court will never preſume that an action is colluſive, unleſs it appear to be ſo.

Doe, on the Demiſe of Brownſmith, *verſ.* Denny.

IN a caſe reſerved, in an action of ejectment, it was ſtated; that, by a marriage ſettlement, an eſtate was conveyed to truſtees, to the uſe of *Henry Tompſon*, the huſband, for life; then to the uſe of *Mary*, the wife, if ſhe ſurvived her huſband, for life; then to the uſe of ſuch child or children as ſhall be begotten by the ſaid *Henry* upon the body of the ſaid *Mary*, and for ſuch eſtate and eſtates, and ſubject to ſuch powers, conditions, proviſions and limitations, as the ſaid *Mary*, notwithſtanding her coverture, ſhall by writing or will appoint; and in default of ſuch appointment, to the uſe of all ſuch children of the ſaid *Henry* and *Mary* in fee, equally to be divided amongſt them, as tenants in common; and in default of ſuch iſſue, then to the uſe of ſuch perſon as the ſaid *Mary* ſhall by will appoint; and in default of ſuch appointment, then to the heirs of the ſaid *Mary* for ever; that *Henry* and *Mary* had iſſue one ſon, named *Henry*; that *Henry*, the father, died; that *Mary*

A deviſe, under a ſuppoſed power, holden to be void.

Mary died afterwards, leaving the ſon under the age of twenty-one years; that during her widowhood ſhe made a will, wherein ſhe declared, that by virtue of certain powers given her by the marriage ſettlement, and of all other powers in her veſted, ſhe deviſed the eſtate to her ſon in fee, and, in caſe he ſhould die under the age of twenty-one years, ſhe deviſed the eſtate to the father of the defendant, in fee; that the ſon afterwards died, under the age of twenty-one years; and that the leſſor of the plaintiff is heir at law to *Henry* the father, and to *Henry* the ſon.

The queſtion was, whether the leſſor of the plaintiff ought to recover?

It was holden, that he ought.

And by *Deniſon* J.—It was clearly the intention of the parties to the marriage-ſettlement, that the iſſue of *Henry* and *Mary*, if there were any iſſue, ſhould take an eſtate in fee. The power given to *Mary*, of deviſing it to a ſtranger, was only given in caſe of a failure of ſuch iſſue. If *Mary* had ſurvived her ſon, the deviſe to the father of the defendant would have been good; becauſe there would in that caſe, agreeably to what is laid down in the caſe of *Holt* v. *Burleigh*, *Prec. in Chanc.* 294. have been a failure of iſſue within the meaning of the marriage-ſettlement: but as ſhe did not ſurvive her ſon, that deviſe is void.

Upon the whole, we are of opinion, and the late Chief Juſtice did concur in this opinion; that *Henry* took an eſtate in fee under the deviſe to him; or an eſtate in fee under the marriage-ſettlement; and that in either caſe, the leſſor of the plaintiff ought to recover.

Tooker

Tooker *verſ.* the Duke of Beaufort.

An exemplification of a record of the court of Exchequer, under the ſeal of that court, is admiſſible evidence.

IN an action of *Treſpaſs*, the matter in iſſue was, whether certain lands, called *Woodcrofts*, were parcel of the manor of *Hinton Daubney?*

At the trial of the cauſe, an exemplification, under the ſeal of the Court of *Exchequer*, of a commiſſion, and of the return thereto, were given in evidence by the plaintiff. The commiſſion, which iſſued *Paſch.* 33 *Eliz.* ſome months after a grant by queen *Elizabeth* of the manor of *Hinton Daubney*, was to enquire, whether the prior of *St. Swithin's* in *Wincheſter*, was heretofore ſeiſed, in right of his priory, of certain lands, called *Woodcrofts*, as parcel of the manor of *Hinton Daubney*; and whether the crown had, ſince the diſſolution of the priory, been ſeiſed thereof, as parcel of the ſaid manor? The return to the commiſſion was, that the prior was heretofore ſeiſed of theſe lands in right of his priory, as parcel of the manor of *Hinton Daubney*; and that, from the time of the diſſolution of the priory to the time of the grant, the crown was ſeiſed thereof, as parcel of the ſaid manor.

Upon a rule to ſhew cauſe, why a new trial ſhould not be had, *Parker* Ch. J. before whom the cauſe was tried, reported, that the verdict, which was for the plaintiff, was in a great meaſure founded upon the evidence of the exemplification of the commiſſion, and of the return thereto; and he added; that, if the court ſhall be of opinion, that the exemplification was not admiſſible evidence; there ought, in his opinion, to be a new trial.

The rule was diſcharged.

And by *Deniſon* J.—It has been ſaid; that the exemplification was not admiſſible evidence; becauſe it was not under the great ſeal: but we are of opinion; that an exemplification of a record of the court of *Exchequer*, under the ſeal of that court, is admiſſible evidence.

It has been ſaid; that, as the crown was not in poſſeſſion of the manor of *Hinton Daubney* at the time it iſſued, the commiſſion was illegal; and conſequently, that no proceeding under it is admiſſible evidence. In ſupport of this objection, it has been ſaid; that antecedently to the 22 *Ch.* 2. *c.* 6. by which ſtatute that right is given, no ſubject had a right to ſuch a commiſſion. Our opinion as to this is, that, as there might have been a doubt, whether the queen was, at the time of the grant, in poſſeſſion of the lands called *Woodcrofts*, or had at that time a right thereto; and conſequently, whether theſe lands did paſs by that grant, the commiſſion for enquiring into that matter might be legal; and, if any caſe can be ſuppoſed, in which it might be legal, the court will, at this diſtance of time, ſuppoſe that caſe; for the ſake of admitting the proceedings under the commiſſion to be given in evidence.

It has been ſaid; that the exemplification ought not to have been admitted in evidence againſt the preſent defendant: becauſe, as the commiſſion was a commiſſion informing, and not a commiſſion entitling, the perſon, from whom he derives a title to the lands called *Woodcrofts*, might be ignorant of the execution of the commiſſion, or might not have an opportunity of being heard; and conſequently, that the commiſſion, and the return thereto, are to be conſidered as *res inter alios actæ*.

Our

Our opinion as to this is; that the commiſſion was general againſt all perſons; that the commiſſioners were bound to receive any evidence offered, to ſhew that the lands called *Woodcrofts* were not parcel of the manor of *Hinton Daubney*; and that, if they had refuſed to receive any ſuch evidence, the return might, and undoubtedly would have been quaſhed. As it does moreover appear; that the commiſſion was executed, and in a moſt public manner, within four miles of the manor of *Charlton*, the then owner of that manor, as parcel of which the lands called *Woodcrofts* are now claimed, could not be ignorant of its execution; and if he did know thereof, he, as has been already obſerved, had an opportunity of ſhewing, that the lands called *Woodcrofts* were not parcel of the manor of *Hinton Daubney*.

Whitmore *verſ.* Rooke.

The iſſuing of a writ is matter of record in the court from which it iſſued.

IN an action of debt, by the aſſignee of a bail bond, the plaintiff alledged; that a *precept*, called a bill of *Middleſex*, was ſued out of this court againſt the defendant in the original action.

The defendant pleaded; that no ſuch *precept* was ſued out.

The plaintiff replied; that ſuch *precept* was ſued out, as appears by the record of this court, and concluded with praying that the record may be inſpected.

Upon a demurrer to this replication, the queſtion was, whether the concluſion be good?

It was holden, that it is.

And by *Deniſon* J.—The iſſuing of a writ from another court, as of an original from the Court of Chancery, is never a matter of record in this court, until the return thereto is filed: but the iſſuing of a writ from this court, although no return thereto be filed, is always a matter of record in this court; becauſe there muſt always appear upon the roll an award of the writ.

It has been ſaid; that the iſſuing of a bill of *Middleſex* is not pleadable, as a matter of record in this court: but we are of opinion that it is. If the writ pleaded in one court was iſſued from another, as if an original from the Court of Chancery be pleaded in this court, the iſſuing of the writ cannot be pleaded, as a matter of record in this court, unleſs the return thereto be filed; for until the return thereto is filed, the writ does not appear upon the rolls of this court: but if the writ pleaded was iſſued from the court wherein it is pleaded, as the bill of *Middleſex* was in the preſent caſe from this court, the iſſuing of the writ is pleadable, as a matter of record in this court, although no return thereto be filed; becauſe the award of the writ muſt always appear upon the rolls of this court.

In the caſe of *Fiſher* v. *Somerville*, *Trin.* 8 *G.* 2. in this court, the defendant pleaded the ſtatute of limitations; the plaintiff replied a bill of *Middleſex*, with divers continuances; the defendant rejoined, that there was not ſuch a bill with ſuch continuances upon the record; the plaintiff ſurrejoined, that there was ſuch a bill with ſuch continuances, and concluded with praying, that the record might be inſpected. The concluſion was holden to be good; and by the court, it will appear, upon

upon inſpecting the rolls of this court, whether there be ſuch a bill of *Middleſex* with ſuch continuances.

It has been ſaid; that in the caſe of (G) *Eſplin* v. *Smollet*, *Eaſt.* 28 *G.* 2. in this court, wherein the ſuing out of a writ of *Fieri Facias* was put in iſſue by the replication, it was holden; that ſuch a replication ought to conclude to the country: but that caſe is of no authority in the preſent caſe. In that caſe, the levying of money under the writ of *Fieri Facias*, which is a matter of fact, was put in iſſue by the replication, as well as the ſuing out of the writ; and conſequently, the determination in that caſe was conformable to what is laid down in the caſe of *Peter* v. *Stafford*, *Hob.* 244. namely, that if the matter of record, which is put in iſſue, be mixed with matter of fact, the trial ought to be by a jury: but in the preſent caſe, wherein nothing is in iſſue but the ſuing out of the bill of *Middleſex*, the concluſion to the record is proper.

Rex *verſ.* the Inhabitants of Eaſt Lidford.

UPON a writ of *Error*, brought upon a judgment in an indictment, it appeared; that the indictment was found at a court of quarter ſeſſions; that the charge therein was, that a certain part of the King's highway in the pariſh of *Eaſt Lidford*, being betwixt a certain place called the *Four-footed Croſs*, and a certain bridge, dividing the ſaid pariſh from the pariſh of *Datchet*, is ruinous, and that the defendant ought to repair the ſame; that the

It is not neceſſary to ſet out the length or breadth of a nuſance, in an indictment for the nuſance.

(G) Ante Page 208.

defendants

defendants were found guilty; and that a fine of twenty pounds was ſet upon them.

The queſtion was, whether the length and breadth of the nuſance be ſet out with ſufficient certainty.

It was holden, that it is.

And by *Deniſon* J.—*Halſey's* caſe, according to the report of it, 2 *Roll. Abr.* 181. is too nice, as to the neceſſity of preciſion in ſetting out the length and breadth of the nuſance in an indictment; and that in another report of the ſame caſe, *Latch.* 183. no notice is taken of the preciſion mentioned by *Rolle.* In the caſe of (H) *Rex* v. *Smith, Trin.* 27 *G.* 2. which was an indictment for laying rubbiſh in a certain place in the King's highway, in the pariſh of *Ottery St. Mary's*, being between a certain place called *Didbridge*, and a certain houſe called *Foxen Holes*, the nuſance was holden to be ſet out with ſufficient certainty.

And by *Foſter* J.—It has been ſaid; that as the length and breadth of the nuſance are not ſet out with preciſion, this court cannot judge, whether a proper fine was ſet: but this court will preſume, that the court of quarter ſeſſions did ſet a fine adequate to the length and breadth of the nuſance proved.

And by *Wilmot* J.—According to ſome old caſes, too much preciſion was, in my opinion, heretofore required, in ſetting out the length and breadth of the nuſance in an indictment.

(H) Ante Page 98.

Hyde,

Hyde, on the Demiſe of Culliford, *verſ.* Thruſtout.

UPON a rule to ſhew cauſe, why the judgment ſigned in an action of ejectment, ſhould not be ſet aſide for irregularity, it appeared; that judgment was ſigned againſt the caſual ejector, in the morning of the fifth day, after the end of the term wherein the judgment was moved for.

A judgment in an action of ejectment ſet aſide, becauſe it was ſigned too ſoon.

It likewiſe appeared, from the report of the maſter; that although the rule made upon the motion for judgment againſt the caſual ejector is in the following words, "that if the "tenant in poſſeſſion ſhall not appear within "four days after the end of the term, judg-"ment may be ſigned againſt the caſual ejec-"tor," judgment ought not, according to the uſual practice of the court, to be ſigned before the afternoon of the fifth day after the end of the term.

The rule was made abſolute.

And by *Deniſon* J.—The uſual practice of the court, and not the letter of a rule, ought in ſuch caſe to be adhered to.

Rex *verſ.* Redman.

UPON a rule to ſhew cauſe, why a view ſhould not be had in an indictment, it appeared, from the report of the Secondary of the crown-office; that, according to the uſual practice of the court, a view ought not to be ordered in an indictment, or in an information without conſent.

A view cannot be had in a criminal action without conſent.

The

The rule was diſcharged.

And by *Deniſon* J.—The practice of the court has been very proper. The power given to the court, by the 4 *Ann. c.* 16. of ordering a view, being confined to civil actions.

Rex *verſ.* Biſſex.

It is not neceſſary to ſet out the evidence, in an order made by one or more juſtices of the peace.

UPON a rule to ſhew cauſe, why the adjudication of two juſtices of the peace, and an order of ſeſſion confirming it, ſhould not be quaſhed, the adjudication was to this purport: " Whereas complaint was made to " us by *J. S.* that twenty-four pounds were " due in arrear to him from *J. N.* at *Lady-* " *day* laſt, for rent; and that he would have " diſtrained the goods and cattle of the ſaid *J.* " *N.* in order to obtain ſatisfaction for the ſaid " rent; but that you the ſaid *John Biſſex*, in " order to prevent this, did, on or about the " twenty-ſeventh, twenty-eighth or twenty- " ninth day of *Auguſt* laſt, wilfully and know- " ingly, aid and aſſiſt *J. N.* in fraudulently " conveying and carrying his goods and cat- " tle off the eſtate of *J. S.* and in concealing " the ſame, being under the value of fifty " pounds, to wit, two cows, one heifer, and " ten hundred weight of cheeſe, of the value " of twenty pounds, contrary to the ſtatute of " the 11 *G.* 2. *c.* 19. whereupon we having, " in your preſence, examined the witneſſes " produced by *J. S.* and having heard what " was alledged in your defence, do adjudge " the complaint to be true; and that the " goods and cattle were of the value of twen- " ty pounds; and that you have, by virtue of " the ſaid ſtatute, forfeited the ſum of forty " pounds, being the double value of the goods

" and

" and cattle carried off to *J. S.* We there-
" fore do adjudge, order and require you the
" ſaid *John Biſſex*, within three days from
" the date hereof, to pay the ſum of forty
" pounds to *J. S.*"

The rule was, upon great conſideration, diſcharged.

And by *Deniſon* J.—It has been ſaid; that the adjudication is to be deemed a conviction; and conſequently, that it is bad, becauſe the evidence is not therein ſet out. If the adjudication were to be deemed a conviction, the objection, on account of the evidence not being ſet out therein, would certainly be fatal; for in the caſe of *Rex* v. *Lloyd*, *Mich.* 8 *G.* 2. it was holden; that the evidence muſt be ſet out in a conviction; and the caſe of *Rex* v. *Pullen*, *Salk.* 369. wherein it is laid down, that it is ſufficient to ſtate in a conviction, that oath was made of the truth of the premiſſes, was expreſsly denied to be law.

But we are of opinion; that the adjudication in the preſent caſe is to be deemed an order; and that it is not neceſſary to ſet out the evidence, in an order made by one or more juſtices of the peace. In the caſe of *Rex* v. *Bathurſt*, *Mich.* 4 *G.* 1. an adjudication, in a caſe of baſtardy, was holden to be an order; and it was likewiſe holden, that although a penalty be inflicted, or a forfeiture be given, by a ſtatute; yet if the word *convict*, or ſome word or words tantamount thereto, be not contained in the ſtatute, an adjudication upon the ſtatute is not a conviction. In the ſtatute, upon which the adjudication in the preſent caſe is founded, neither the word convict, nor any word or words tantamount thereto, are contained, and conſe-

quently the adjudication ought not to be deemed a conviction.

It has been ſaid; that it does not appear, that the rent was due at the time of carrying off the goods and cattle: but, as it appears that the rent was due at the *Lady-day* preceding, and that the goods and cattle were carried off to prevent a diſtreſs, it may fairly be preſumed, that the rent continued to be due; and the rather, as the defendant, in caſe it had been ſatisfied, had an opportunity of ſhewing this in his defence before the juſtices.

It has been ſaid; that it does not appear when the rent became due: but in the caſe of *Stagg* v. *Hind*, *Salk.* 139. it was holden; that it is not neceſſary to alledge this, in the declaration in an action for rent in arrear; and, *a fortiori*, it is not neceſſary to alledge this in an order of two juſtices.

It has been ſaid; that the charge in the complaint to the juſtices, which is, that the goods were carried off on or about the twenty-ſeventh, twenty-eighth, or twenty-ninth day of *Auguſt* laſt, is not ſufficiently certain. As part of the goods might be carried off upon every one of thoſe days, the court, if it were neceſſary, would intend that to have been the caſe, for the ſake of ſupporting the order of the juſtices: but it is not neceſſary to make ſuch intendment. If a time for proſecuting is limited by the ſtatute creating an offence, the preciſe day both of the offence, and of the conviction, muſt, as is laid down in the caſe of *Rex* v. *Pullen*, *Salk.* 369. be ſhewn, that the proſecution may appear to be within the limited time: but if no time for proſecuting is limited by the ſtatute creating an offence, it is not neceſſary, that the preciſe day of the offence ſhould be ſhewn in a conviction; and,

a for-

a fortiori, it is not neceſſary to ſhew this in an order. In the caſe of *Rex* v. *Simpſon*, *Hil.* 3 *G.* 1. which was a conviction for killing deer, the offence was ſtated to have been committed, between the laſt day of *April* and the firſt day of *May*: yet the conviction was holden to be ſufficiently certain.

It has been ſaid; that it is not ſtated in the adjudication, that *J. N.* did carry off his goods and cattle; and that the defendant could not be guilty of aiding and aſſiſting in carrying off the goods and cattle of *J. N.* unleſs *J. N.* did carry off his goods and cattle. In the caſe of *Rex* v. *Monk*, *Mich.* 13 *G.* 2. it was ſtated in a conviction, that the defendant did aid and aſſiſt in killing a deer. An objection was made; that it did not appear whom the defendant had aſſiſted; and it was ſaid, that there cannot be an acceſſary, unleſs there be a principal. The objection was over-ruled; and by the court, the conviction is in the words of the ſtatute, which has been always holden to be ſufficient. It is a miſtake, to call the defendant an acceſſary; for two diſtinct offences, one of which is killing a deer, the other aiding or aſſiſting in killing a deer, are created by the 3 & 4 *W.* & *M.* *c.* 10. and conſequently, the defendant is as much a principal within the meaning of that ſtatute, as if he had himſelf killed a deer. It may be inferred from this caſe, that it was not neceſſary to ſtate, in the adjudication in the preſent caſe, that *J. N.* did carry off his goods and cattle: but if that were neceſſary, it is ſtated ſufficiently; for it is ſtated, that the defendant did aid and aſſiſt *J. N.* in carrying off his goods and cattle; and unleſs *J. N.* did carry off his goods and cattle, it is impoſſible, that the defendant could aid and aſſiſt him in ſo doing.

Sheldon *verſ.* Foot.

A perſon, who has been diſcharged as a fugitive, may be holden to ſpecial bail.

UPON a rule to ſhew cauſe, why the defendant, who was in cuſtody for want of ſpecial bail, ſhould not be diſcharged upon filing common bail, it appeared; from the duplicate of the defendant's diſcharge, that he had been diſcharged as a fugitive, under an act for the diſcharge of inſolvent debtors: but it likewiſe appeared; that at the time the defendant is in the duplicate ſaid to have been abroad as a fugitive, he was abroad in the courſe of his trade.

The rule was diſcharged.

And by *Deniſon* J.—It has been reſolved, at a meeting of all the judges; that the plaintiff is not precluded, in a caſe like the preſent; by the production of the duplicate of the defendant's diſcharge, from ſhewing, that the defendant was abroad in the courſe of his trade; and that if this be ſhewn, the defendant is not entitled to be diſcharged upon filing common bail.

Waller *verſ.* Green, and Three Others.

The court refuſed to permit the names of two perſons to be ſtricken out of the bail-piece.

UPON a rule to ſhew cauſe, why the names of two of the defendants ſhould not be ſtricken out of the bail-piece, and why an *Exoneretur* ſhould not be entered as to them upon the bail-piece, it appeared; that theſe two defendants had been excepted to as bail for *J. S.* that thereupon the other two defendants were added as bail for *J. S.* and did juſtify; and that an action of *Scire Facias* was brought againſt the four defendants.

The

The court were at firſt of opinion; that the names of the two defendants might have been ſtricken out of the bail-piece, without applying to the court; for that, as they were excepted to as bail, and did not juſtify, they ceaſed to be bail: but the maſter reported; that the names of ſuch perſons are always continued upon the bail-piece, unleſs a rule of court be made for ſtriking them out.

The court, upon this report, inclined to make the rule abſolute: but, upon its being ſaid, that if this rule ſhould be made abſolute, the other two defendants might plead *nul tiel Record* to the action of *Scire Facias*, it was diſcharged.

A rule was afterwards made; that proceedings in the action of *Scire Facias* ſhould be ſtayed, as to the two defendants, who now applied to have their names ſtricken out of the bail-piece.

Rex *verſ.* Fox.

An order of baſtardy quaſhed as to part, and holden to be good as to the reſidue.

UPON a rule to ſhew cauſe, why an order of baſtardy, made by two juſtices of the peace, and an order of ſeſſions confirming it, ſhould not be quaſhed, one objection to the order of the two juſtices was; that there is no adjudication in the order, that the child was born in the pariſh, for the relief of which it was made.

This objection was over-ruled.

And by the court—It was holden, in the caſe of *Rex* v. *Moravia, Eaſt.* 15 *G.* 2. and in the caſe

caſe of *Rex* v. *Rook*, (1) *Mich.* 26 *G.* 2. that if it can be collected from an order of baſtardy, that the child was born to the pariſh, for the relief of which it was made, the order is good.

Another objection to the order of the two juſtices was; that the groſs ſum of fifty ſhillings is ordered to be paid to the churchwardens, for defraying the expence incurred by the pariſh on account of the lying-in of the mother of the child; and it was ſaid, that the particulars of the expence ought to have been mentioned.

This objection was over-ruled.

And by the court—As it appears, that the money, ordered to be paid, was expended on account of the lying-in of the mother of the child, the order is good. In the caſe of *Rex* v. *Moravia*, wherein a groſs ſum of money was ordered to be paid, for defraying the expence incurred by the pariſh on account of the lying-in of the mother of the child, and other incidental charges, the order, although the words, relative to the expence, were more general than the words in the preſent caſe are, was holden to be good.

An objection was made to a part of the order of ſeſſions, whereby ſecurity was required to be given by the putative father of the child, to perform the order made by the two juſtices.

This objection was holden to be good.

And by the court—The court of quarter ſeſſions is not impowered, either by the 18 *Eliz.*

(1) Ante Page 61.

c. 3.

c. 3. or by the 6 *G.* 2. *c.* 31. to require ſuch ſecurity from the putative father of a baſtard child.

A rule was made for quaſhing that part of the order of ſeſſions, which related to the ſecurity, and for confirming the order of the two juſtices, and the reſidue of the order of ſeſſions.

And by *Deniſon* J.—In the caſe of *Regina* v. *Chaffey*, Lord *Raym.* 858. an order of baſtardy was quaſhed as to part, and confirmed as to the reſidue; and the ſame was done in the caſe of *Rex* v. *Maſſinger*, *Trin.* 5 *G.* 2.

Rex *verſ.* the Inhabitants of Duns-Tew.

IN an order of ſeſſions it was ſtated; that the *Pauper*, and *Goodman* his father-in-law, occupied a farm, at the rent of eighty pounds a year, in the pariſh of *Duns-Tew*, as partners; that in the year 1747, *Goodman* hired a farm in *Little-Tew*, at the rent of fifty pounds a year; that before *Goodman* entered upon the farm in *Little-Tew*, the *Pauper* aſked him, if he depended upon his going with him? To which *Goodman* anſwered, yes, for I cannot go without you; that *Goodman* and the *Pauper* went with their joint ſtock from *Duns-Tew* to *Little-Tew*, and reſided upon and managed the farm in *Little-Tew* jointly ſeven years; that the receipts for the rent were given to *Goodman* alone; that, upon the taking of a diſtreſs for rent in arrear, *Goodman* alone executed a bill of ſale of the ſtock to the landlord; that when the bill of ſale was executed, the *Pauper*, although preſent, did not claim any intereſt in the ſtock; that in the year 1754, the *Pauper* left the farm, and *Goodman* allowed him ſixty-two

A ſettlement may be gained by occupying a tenement, altho' there be not an actual hiring.

two pounds for his ſhare of the ſtock; and that the *Pauper* was ſoon after removed by an order of two juſtices to *Duns-Tew*.

The queſtion was, whether the *Pauper* did gain a ſettlement in *Little-Tew*?

It was holden that he did.

And by the court—An actual hiring of a tenant is not neceſſary to the gaining of a ſettlement; for as no power is given, by the 13 & 14 *C.* 2. *c.* 12. of removing a perſon, who comes to ſettle in a tenement, of the annual value of ten pounds, ſuch perſon is irremoveable; and conſequently, he may gain a ſettlement.

It has been ſaid; that no credit was given, by the landlord of the farm in *Little-Tew*, to the *Pauper*: but this is not neceſſary; for the ſettlement, which is gained by the occupation of a tenement, of the annual value of ten pounds, is not gained, by reaſon of the credit given by the landlord to the occupier, but becauſe the legiſlature have in effect ſaid, that the perſon of ability to occupy ſuch tenement ſhall not be removed.

It has been ſaid; that the *Pauper* was, at the utmoſt, no more than tenant at will to *Goodman*: but an occupier, as tenant at will, may gain a ſettlement. In the caſe of *Cranley* v. *St. Mary's, Guildford, Hil.* 8. *G.* 1. it was holden; that a ſettlement was gained by occupying a mill two years, in purſuance of an agreement with the leſſee of the mill, although there was no aſſignment of the leaſe. In the preſent caſe, the *Pauper*, in purſuance of an agreement with *Goodman*, did occupy the farm in *Little-Tew*, jointly

jointly with *Goodman*, ſeveral years; and conſequently, as the annual value of the farm was fifty-two pounds, the *Pauper* did gain a ſettlement in that pariſh.

Kearle qui tam *verſ.* Whiteland.

UPON a motion, that the defendant might be allowed to exhibit a petition, to be brought up, in order for his being diſcharged out of priſon, it appeared; that the defendant was charged in execution in *Hilary* term laſt; that the 2 *G.* 2. *c.* 22. upon which ſtatute the defendant's right of petitioning is founded, after having been ſeveral times continued, was further continued by the 29 *G.* 2. *c.* 28. that the royal aſſent was not given to the latter ſtatute, until the twenty-ninth day of *May* laſt; and that by the 8 *G.* 2. *c.* 24. it is provided; that no perſon ſhall be allowed to exhibit a petition upon the 2 *G.* 2. *c.* 24. unleſs the petition be exhibited before the end of the term, next after ſuch perſon ſhall be charged in execution.

The words, *next term*, in a ſtatute, ought to be conſtrued *next term*, in which the thing required can be done.

The queſtion was, whether leave could be given to exhibit the petition?

It was holden, that it might.

And by *Deniſon* J.—As the laſt *Eaſter* term was at an end, before the royal aſſent was given to the 29 *G.* 2. *c.* 28. it was impoſſible for a priſoner, who was charged in execution in the laſt *Hilary* term, to exhibit a petition in the *Eaſter* term. This being ſo, all the judges, upon conferring together, have been of opinion; that the words the next term in

the 8 *G.* 2. *c.* 24. ought to be conſtrued the next term, in which it was poſſible to exhibit a petition; and conſequently, that a priſoner, charged in execution in *Hilary* term laſt, may exhibit a petition in this term. By the *Habeas Corpus* act, the liberty given to a priſoner, of petitioning to be brought to his trial, is confined to the firſt week of the next term, or to the firſt day of the next ſeſſions of *Oyer* and *Terminer*, or general goal delivery, after the priſoner was committed; yet it may be inferred, from what is laid down in lord *Ayleſbury*'s caſe, *Salk.* 103. that, if the *Habeas Corpus* act be ſuſpended by another act of parliament, a priſoner may petition during the firſt week of the next term, or upon the firſt day of the next ſeſſions of *Oyer* and *Terminer*, or general goal delivery, after the expiration of the ſuſpending act.

Rex *verſ.* the Inhabitants of Taunton St. Mary's.

A certificate holden to be at an end, by reaſon of its not having been reſided under for many years.

IN an order of ſeſſions, it was ſtated; that *Robert Bagg* went, in the year 1702, to reſide in the pariſh of *Taunton St. Mary*'s, under a certificate from the pariſh officers of *Taunton St. Mary*'s; that the ſaid *Robert* afterwards returned to the pariſh of *Taunton St. James*'s; that after his return, he had a ſon *Robert* born in the pariſh of *Taunton St. James*'s; that the *Pauper*, who is the ſon of *Robert* the ſon, was born whilſt his father reſided in the ſeparate houſe; that after the death of *Robert* the grandfather and *Robert* the father, who both to the time of their deaths reſided in the pariſh of *Taunton St. James*'s, the *Pauper* ſerved an apprenticeſhip in the pariſh of *Taunton*

Taunton St. Mary's; and that the certificate was never delivered up.

The queſtion was, whether the *Pauper* did gain a ſettlement in the pariſh of *Taunton St. Mary*'s?

It was holden, that he did.

And by *Deniſon* J.—It has been ſaid; that a certificate does not extend to a grandchild. It has been alſo ſaid; that *Robert*, the ſon, was ſo emancipated from his father's family, by marrying and living ſeparately from his father, that his ſon, although the court ſhould be of opinion that a certificate does extend to a grandchild, might gain a ſettlement by ſerving an apprenticeſhip in the pariſh of *Taunton St. Mary*'s. It is not neceſſary, to give an opinion upon either of theſe points; becauſe we are of opinion, that, as there was no reſidence under it for ſo many years, the certificate, although it was not delivered up as it ought to have been, was at an end before the *Pauper*'s apprenticeſhip began, and conſequently, that he did gain a ſettlement in the pariſh of *Taunton St. Mary*'s. If the grandfather had been living at the beginning of the *Pauper*'s apprenticeſhip, he could not, after being ſo long returned to the pariſh of *Taunton St. James*'s, have gone to reſide in the pariſh of *Taunton St. Mary*'s, under the certificate.

Giddings *verſ.* Giddings.

Leave given, after argument, to withdraw a demurrer, and to reply.

AFTER a demurrer to the defendant's plea had been argued, and the matter ſtood over for the judgment of the court, a rule was made to ſhew cauſe, why the plaintiff ſhould not have leave to withdraw his demurrer, and to reply to the plea.

This rule, no cauſe being ſhewn, was afterwards made abſolute.

Rennell *verſ.* Rennell.

If the condition of a bond be ſufficient, performance muſt be pleaded in the words of the condition.

AN action of debt being brought upon a bond, and *Oyer* being prayed, there appeared to be a recital in the condition of the bond; that *William Rennell*, father of the plaintiff and defendant, had by his will bequeathed to the defendant the remainder of an eſtate for three lives, which the teſtator had in a certain garden; that he likewiſe bequeathed to the plaintiff a hogſhead of cyder, to be paid him every year that apples enough ſhould grow in the ſaid orchard to make two hogſheads of cyder; and the condition of the bond was, that the defendant ſhould deliver to the plaintiff a hogſhead of cyder every year, according to the true intent and meaning of the ſaid will. The defendant pleaded; that upon a certain day he ſold his intereſt in the orchard; that thereupon he agreed to deliver a hogſhead of cyder to the plaintiff, every year that apples enough ſhould grow in the ſaid orchard to make two hogſheads of cyder, in ſatisfaction of the hogſhead of cyder bequeathed to him, although the hogſhead of cyder, to be delivered by the defendant, ſhould

ſhould be made of apples, which did not grow in the orchard mentioned in the condition of the bond; that in purſuance of this agreement, the bond was entered into; and that he had performed the condition of the bond.

Upon a demurrer to this plea, it was holden to be bad.

And by *Deniſon* J.—If the condition of a bond be in general and affirmative terms, it is ſufficient to plead general performance of the condition: but if the condition of a bond be ſpecial, performance muſt be pleaded in the words of the condition. In the caſe of *Brooks* v. *Down*, which is cited in the caſe of *Woodcock* v. *Cole*, 1 *Sid.* 215. it is laid down; that in an action of covenant upon an indenture, in which there are divers affirmative covenants, it is ſufficient to plead performance generally: but that in an action of debt upon a bond, of which the condition is ſpecial, performance muſt be pleaded of every thing compriſed in the condition.

Foſter J. and *Wilmot* J. concurred in this opinion; but, as it appeared, that a hogſhead of cyder had been delivered every year, in which apples enough grew in the orchard mentioned in the condition to make two hogſheads, the pronouncing of judgment was ſuſpended for a week, in order to give the defendant time to move for leave to amend.

THE END.

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FINIS.